IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 16/2022

In the matter between:

MBHEKENI ZWANE	**1st Appellant**
KHABONINA ZWANE	**2nd Appellant**
NKOSITHINI ZWANE	**3rd Appellant**
OKAY ZWANE	**4th Appellant**
LUNGILE ZWANE	**5th Appellant**
RUTH ZWANE	**6th Appellant**
THEMBA ZWANE	**7th Appellant**
AFRICA ZWANE	**8th Appellant**
MONDI ZWANE	**9th Appellant**
MFANAWENDLELA ZWANE	**10th Appellant**
SANELE ZWANE	**11th Appellant**
NTOMBILENI ZWANE	**12th Appellant**
LOMASONTFO HLETA	**13th Appellant**
NTOMBI DLAMINI	**14th Appellant**

NONDUMISO MTSETFWA	**15th Appellant**
TIGEZILE ZWANE	**16th Appellant**
And	
SICELO ZWANE	**1st Respondent**
THABSILE ZWANE - MATSEBULA	**2nd Respondent**
MATHOKOZA ZWANE	**3rd Respondent**
MDUDUZI ZWANE	**4th Respondent**
THEMBISILE MAZIBUKO	**5th Respondent**
NOMCEBO ZWANE	**6th Respondent**
SIVIWE ZWANE	**7th Respondent**
THE NATIONAL COMMISSIONER	
OF POLICE	**8th Respondent**
THE ATTORNEY GENERAL	**9th Respondent**
THE MASTER OF THE HIGH COURT	**10th Respondent**

Neutral Citation: Mbhekeni Zwane and 15 Others vs Sicelo Zwane and 9 Other *(16/2022) [2023] SZSC 39 (14/09/2023)*

Coram: **S.P. DLAMINI JA;**
S.J.K. MATSEBULA JA; AND
N.J. HLOPHE JA.

Date Heard: 23rd March, 2023.

Date Delivered: 14th September, 2023.

SUMMARY : *Civil Law – Civil Appeal –Invasion and Take-Over of Homestead – On Swazi Nation Land – Without Court Order – Court Characterizes Course of Action – Spoliation – Remedy of Mandament Van Spolie Available – Court Issues and Confirms Temporal Interdict.*

Held: Orders of temporal interdict and remedies of mandament van spolie are competent and are within the jurisdiction of the High Court as well as the Supreme Court even on matters relating to Swazi Law and Custom and even where cause of action arises in Swazi Nation Land.

Held: An order for the maintenance of peace and restoration of the status quo before self-help, in appropriate circumstances, cannot be a bar to pursuit of Siswati Law and Custom.

Held: The audi alterem partem rule can only be invoked successfully by a litigant who has been denied an opportunity to be heard and not one who deliberately waived such constitutionally given right.

Held further: Appeal dismissed with costs.

JUDGMENT

S.J.K MATSEBULA, JA:

The Parties

[1] The Appellants are Mbhekeni Zwane and fifteen (15) Others and the Respondents are Sicelo Zwane and nine (9) Others. They are all family members embroiled in the Estate of the late Robert Zwane, a known business man and former Senator.

Background

[2] From the papers before this Court, it would appear the late Mr. Robert Lobi Zwane had three wives married under Siswati Law and Custom. Each wife bore him a number of children. According to the judgment *a quo*, the late Robert Zwane built a communal marital home in the 1980's at Zakhele Township in Manzini urban area. In this compound, which comprised a number of building units, he settled his wives, each to a separate building unit as commonly accepted under Siswati Law and Custom.

[3] Later in 1995, the late Robert Zwane *khontaed* and was allocated Swazi Nation Land (e*sicintsini*) at Mbadlane under the Malindza chiefdom. Here he built a big homestead, a compound to be precise, with several buildings including large houses, some described as flats. The litigants refer to some of these as houses and flats. Paragraph [9] of the judgment a *quo states:*

> *"It emerged as an admitted fact that the deceased (Robert Lobi Zwane) had designed and configured to accommodate the entire family household*

with the several wives in order to relocate them from Zakhele to the more idyllic Malindza"

The envisaged relocation did not materialize to any extent except that one wife, Angellinah Dlamini (the mother of the 1st Respondent and others) was relocated to this new homestead, which is now the subject of this litigation.

[4] From the record on appeal it is not disputed that the said Angelinah Dlamini, the mother of 1st Respondent and others, she together with her children and the late Robert Zwane occupied this homestead. It is not clear as to when Robert Zwane died, but at the time of his death, which is some years now, he lived in the compound with the said Angellinah Dlamini and her children including the 1st Respondent. The Appellants do not dispute this fact but claim to have also lived in this compound or homestead.

[5] A chiefdom or umphakatsi under Swazi Nation Land is under the administrative control of a chief exercising limited ruling or governing or administrative powers through a chief's council. There is no better place or institution other than a chief's council to look and find evidence as to who is or is not a lawful resident of a chiefdom or umphakatsi. It is therefore common and lawful for a court of law to make or order reference to such traditional structures respecting issues of occupational rights, lawful residents, subjects who kontaed and such other similar issues or matters. Traditional structures in the hierarchical form start from the family council to *Umphakatsi*, Swazi Courts together with its appellate structures and at the apex, the *Ingwenyama*

who normally exercises his authority through advisory councils known as emabandla

[6] After the death of Robert Zwane, the seeds of this dispute started emerging. In 2007 the said Angellinah Dlamini suffered a debilitating stroke, incapacitating her speech ability, paralysis confining her to a wheel-chair hence she is represented by the 1st Respondent in these proceedings. In short, the Respondents represent her as well as themselves.

Historical facts respecting the dispute

[7] According to the papers before us, the Appellants are said to have invaded the homestead and took it over. The word "invade or invension" can only be used in reference for someone who comes from outside. It would appear in this case the Appellants organized each other to be at the disputed homestead on a pretext of a family meeting. It is not stated in the papers whence the Appellants reside or came from, though it would appear they came from different or diverse places.

[8] On arrival at the homestead, the Appellants, according to the 1st Respondent, on Saturday the 10th April, 2021 they decided to break into the houses within the homestead, vandalize property by breaking some of the door handles and took occupation of some, if not all of the houses. It is said the Appellants harassed, intimidated, threatened and even assaulted some of the Respondents hence the Respondents had to flee the homestead in fear for their lives. The

Appellants denied this but admitted meeting at the homestead on the 10th April 2021 and said that the Respondents left or vacated the homestead on their free will or volition and under no pressure from them and as a result they did return later and took occupation of the homestead and resided therein right up to the time of prosecution of the case. It is inconceivable though that the Respondents would vacate the homestead, a homestead which some have only known as their home and which they have peacefully occupied for many years without any outside pressure. And only return to it after the incident of the invasion had been reported to the police.

[9] The court *a quo*, digested and determined the matter and correctly identified the cause of action and the applicable remedies. The first being a prohibitory interdict to restrain the Appellants from harassing, intimidating and applying or threatening to apply violence on the Respondents. The second cause of action and remedy being spoliation and its remedy of *mandament van spolie*. Hence the following orders as per Maphanga J at page 25 of His Lordship's judgment-

> "1. *Pending the referral and deliberation upon the matter pertaining to claims to the homestead by the Zwane Family Council (Lusendvo) or other appropriate authority or forum-*
>
> *1.1 That the First to fifteenth Respondents and anyone acting for or on their behalf, are hereby interdicted from harassing, threatening intimidating or assaulting any of the Applicants in any manner whatsoever in this matter;*

1.2 That the first to fifteenth Respondents be and are hereby ordered to vacate the main house occupied by the Applicants and their mother prior to their eviction; to restore possession thereof to the Applicants and to hand over any keys and or any articles or contents of the main house; to desist from hindering the Applicants access to the homestead and possession of the said main house;

1.3 That the sixteenth Respondent is directed to procure and deploy adequate resources necessary for the security and the enforcement of the orders as well as restoration and maintenance of peace at the Zwane premises; to do all necessary to ensure the due compliance and execution of the orders by the Respondents.

[10] Consequent to the above orders of the court *a quo*, the Zwane family council was convened and all the fighting parties, that is, Appellants and the Respondents were duly notified of the date of the meeting. The Appellants came to the Zwane homestead but did not participate as they remained outside the meeting and became roudy there. It should be noted that they were either ill-advised or they ill-advised themselves because by so doing they were denying themselves the right to be heard which is guaranteed by the Constitution. They did this again when they were given a notice calling upon them to attend a court hearing concerning the result of the family council meeting. They refused to accept the court process for set down of the matter.

On the date sat down for the hearing their attorney did not attend the court hearing but was in the precinct of the court building hence as soon as the hearing was over he approached the Respondent's attorney to enquire about the result or conclusion of the court hearing.

The Zwane Family Council Minutes

[11] The Zwane Family Council (*Lusendvo*) met on the 10th July, 2021 at Malindza, as alluded to above and all the litigants in this matter had been invited to attend the meeting. Only the Respondents herein participated in the meeting. The Appellants did not formally attend the meeting and but some of them were present within the homestead's precincts and chose to remain outside the meeting thus denying themselves their constitutional right to be heard. Indirectly they were defying the court *a quo* as the meeting was sanctioned by that court. Not content with the defiance and deprivation of their right to be heard they became disorderly and riotous outside.

[12] In summary the Zwane Family Council stated that the late Robert Zwane used the name of Angelinah Dlamini to *khonta* under the Malindza *Umphakatsi* and that it only knows her as the rightful person or wife to the homestead. It also pointed out that the other wives did not reside in the said homestead. It further stated that as far as it knows the other wives of the late Robert Zwane have their own separate homesteads away from the disputed one. It resolved that Lomasontfo Hleta (13th Appellant the mother of the 1st Appellant) should reside together with her children at her own homestead at Mduzeni, Malindza, and that LaNkhosi (probably 14th Appellant and mother of Themba, 7th

Appellant) should resided together with her children at Emahaleni, Malindza. These are homesteads built by the late Robert Zwane for his wives.

[13] At the hearing of the matter as per the notice of set down, the court *a quo,* confronted by the above-described circumstances had no other option but to grant the following orders on the 29th of March, 2022 as prayed by the Respondents in the following terms -

> *"1. The Ruling of the Zwane Family Council held on the 1st July, 2021*
>
> *annexed hereto marked "A" is endorsed and made an Order of Court;*
>
> 2. *The interim orders granted by the Court through its judgment dated 25th May 2021 are hereby made final orders;*
>
> 3. *The Police Officers at Mpaka/Siteki Police Station are ordered to arrest anyone on sight who defies the Court Orders herein".*

[14] The Appellants have now appealed to this Court complaining of the orders of the court *a quo.*

The Appeal

[15] The Appellants dissatisfied with the orders of the court *a quo* have approached this Court and listed eight grounds of appeal.

In summarizing the grounds-

(a) The first ground is that the Court made the orders without first satisfying itself that the family council decision had been properly taken in accordance with Swazi Law and Custom.

(b) The judge *a quo* did not satisfy himself on whether the family council *(Lusendvo)* was the rightful one.

(c) The judge *a quo* violated the *audi alterem partem* rule by granting the orders without hearing the Appellants.

(d) The judge *a quo* gave the orders without satisfying himself that the Appellants had not appealed the family council decision to traditional structures and in so doing applied the received law when the matter is one for Siswati Customary Law.

(e) The judge *a quo* did not appreciate the matter as one falling to be decided under Siswati Customary Law.

(f) The judge *a quo* erred in law by relying on an invalid order of the family council which did not hear out the Appellants and that the family council was improperly constituted.

(g) The judge *a quo* was wrong to endorse the order of the family council as by so doing he closed the avenue for appeal to traditional structures.

(h) The judge *a quo* was wrong to endorse the order of the 25th May, 2021 when it had referred the matter to the family council for deliberation.

[16] And the Heads of Arguments were formulated as follows-

> *"2.1 Whether or not the court a quo was correct in endorsing the decision of the Family Council in circumstances where the Court itself was aware that the Appellants were not present at the meeting of the said Family Council?*
>
> *2.2 Whether or not the court a quo was entitled to endorse the decision of the Family Council arrived at in violation of the audi alterem partem rule?*
>
> *2.3 Whether or not the court a quo was justified in granting the order of the 29th March, 2022 against the Appellants without it (the Court) having heard the Appellants?*
>
> *2.4 Whether or not the court a quo curtailed the rights of the Appellants to be heard by traditional structures by endorsing the decision of the Family Council, effectively shutting out the Appellants from being heard by [the] traditional structures.*
>
> *2.5 Whether or not the orders of the court a quo of 25th May, 2021 were still capable of confirmation by the High Court as at the 29th March, 2022 after the Family Council had deliberated on the matter on the 10th July, 2021?*

The analysis of the grounds of appeal and the applicable law

[17] The above arguments could rationally be interrogated and determined as we do in the following paragraphs-

(a) Under the first head 2.1. The court *a quo* was justified to endorse the family decision because the court *a quo* was informed that not only did the Appellants refuse to participate and exercise their rights to present their side of the story but remained outside and became riotous. It could be said they were in a way defying the very Court which had issued an order for resolution of the disputed facts by the family Council. The family Council was required to meet so as to assist the Court to come to a conclusion on the interim orders it had issued on 25th May, 2021.

(b) Not only that on the 21st March 2022 the Appellants were served a Court application for a hearing slated for the 24th March, 2022. They did not show up in court and for some unexplained reasons, the matter was also not on the court-roll. A notice of set down was then served by the Respondents for a hearing slated for the 29th March, 2022 but the Appellants' attorney refused to accept it. The matter proceeded to be heard on the 29 the March, 2022 and the Appellants once again waived their right to be present in court and to be heard.

[18] The Appellant's behavior of refusing to participate in Family Council meeting, their refusal to accept court process and their non-appearance could be seen as hostility towards the court *a quo's* efforts to amicably resolve the dispute. Such behavior is born from a misguided belief that there could be gold in silence, holding the belief that let the Applicants get their order from the Family Council as well as the court *a quo* but with the intention to appeal such orders at the Court of Appeal on the self created or self induced grounds

based on the principle of *audi alterem partem*: that they were not heard by both the Family Council as well as the court *a quo*. The belief was that the *audi alterem partem* rule would do wonders. It cannot assist a person who has been offered it but the person chose to reject it.

[19] On head of argument 2.2, the answer is the same as on the preceding paragraph. The Appellants were invited to a hearing to the Family Council of the 10th July, 2021 as well the court hearing of the 29th March 2022 but without offering a reason or excuse ignored and refused to attend such hearings. The Appellants could not be heard because they chose not to be heard and such choice or refusal could not be blamed on anyone but themselves. The court *a quo* was therefore justified to endorse the Family Council decision if its dignity had to be drummed on the ears of the Appellants and if the litigation had to reach finality and have justice disbursed to whoever deserved it.

[20] On head of argument 2.3, the court *a quo*, heard that the Appellants refused to accept notice inviting the Appellants (notice of set-down) to be in Court and the court *a quo* saw with its own eyes the non-appearance which was a sequel to their refusal to accept the court process.

[21] On head of argument 2.4. This head of argument corresponds to ground of appeal No.7 and displays failure of appreciation of the matter that was before the court *a quo*, the characterization of the cause of action and the remedies sought to be applied to the dispute and lastly the depth and nature of the

directive of the court *a quo* when it referred the matter to the Family Council or traditional structures. This failure could be attributed to our legal education which has emphasis on the received law (Roman - Dutch Law) at the expense of our own indigenous law which is recognized by section 252 (2) of the Constitution which states-

> *"252 (2) subject to the provisions of this Constitution, the principles of Swazi Customary Laws (Siswati Law and Custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland".* (Underlined for emphasis)

In passing it is hoped our language experts may wish to look into use of a correct name for our indigenous law whether we should refer to it as "Siswati Law" with or without the addition of "custom" in the same breath as we have "English Law" or "Roman Dutch Law" without the suffix "custom or customary" as we all know these law systems also evolved from the customs and practices of those nations.

[22] Let it be explained what the Court *a quo* said when making its orders on the 25th May, 2021 at paragraph [59] of the judgment (page 75 of the Record on Appeal) -

> *"Pending the referral and deliberation upon the matter pertaining to the claims to the homestead by the Zwane Family Council (Lusendvo) or any other appropriate authority or forum".*

The first misunderstanding to this clear stipulation manifests itself on paragraph 1.2 of the Appellants Heads of Argument where the following passage is found-

> *"1.2. In the judgment the High Court referred the matter serving before it to the Zwane Family Council (Lusendvo) before which the issue of the ownership of the homestead then in issue would be deliberated...".*

[23] The Court *a quo* did not refer the matter to the Family Council for issues of ownership as the court *a quo* was not seized with such issues but was seized with issues of ***invasion, attacks, intimidation, unlawful take-over of a homestead without a court order and an unlawful eviction of the occupiers of that homestead and the issuance of interdicts and spoliation***. The Appellants had harassed, intimidated, broken doors and applied violence on one Angellinah Dlamini, wife to late Robert Zwane and mother to 1st Respondent) and evicted the said Angellinah Dlamini and certain others from the homestead she had been occupying peacefully since 2007 or even much longer. Those were issues before Court and the question of ownership of the homestead was not in dispute as all parties knew it belongs to the late Robert Zwane until an *Inkosana* is appointed who would assume administration powers over the whole homestead and beyond as if the late Robert Zwane has resurrected (stepping into his shoes of the head *or father* of the family).

[24] Understanding that the issue referred to the family council by the court *a quo* is a small part of the bigger and more serious issues still to be deliberated by

the Zwane Family Council, such as appointment of *Inkosana*, endorsement of *Indlalifa* (singular and plural), fate of the wives etc. With such understanding, the Appellants cannot be heard to be saying the judgment of the court *a quo* has *"curtailed the rights of the Appellants to be heard by traditional structures... effectively shutting out Appellants from being heard by the traditional structures"*. The issues we refer to as bigger and more serious fall with the jurisdiction of the traditional structures and are still to be referred and determined by the family council and other traditional structures.

The curtailment and shutting to further pursuit of Siswati Law can only be true in respect of final interdicts against self-help which is by its nature unlawful manifesting in whatever form. The form could, as in this case, be harassment, intimidation, assault, threat of violence or spoliation. The High Court and the Supreme Court has and shall always have jurisdiction to, in such cases, issue temporal interdicts and give redress in one form or another including possessory remedies of *mandament van spolie* and ownership remedies of *rei vindicatio*. This is a well established proposition in our law as may be gleaned from numerous decisions but two should suffice. The case of Swaziland ***Commercial Amadoda Road Transportation and Others v SitekiTown Council (254 of 2012) 2012 SZHC* 80 (28 March 2012)** is very instructive on the matter as per MCB Maphalala J. as he then was, at paragraphs 17 and 18 –

> *"[17] It is trite law that the essence of the "mandament van spolie" is that the person who has been deprived of possession must first be restored to his former position before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order by restraining persons from taking the law*

that is, was limited to occupational rights and certainly not to other issues, not even to ownership.

The misdirection exhibited by the Appellants herein is the result of failure to pay attention to detail. Some of the grounds of appeal are the result of failure to obey lawful orders issued by the court *a quo* to meet as a family council coupled with disrespect for court processes that when served with court process one has to accept it and act according to its demand at the pain of attracting dire consequences. Secondly, it is the failure to comprehend the principles of Siswati Law. Lastly, the misdirection is as a result of failure, as mentioned above, to pay attention to detail. The referral to the Family Council was narrow and limited in scope and had nothing to do with ownership of the homestead which vested and shall for a long-time vest, in terms of Siswati Law of *kukhonta,* on the late Robert Zwane. All the grounds of appeal, are therefore, liable to fail as lacking of merit and they so fail.

[29] There is an incidental aspect of this matter which we would like to comment upon. There is evidence accepted by the court *a quo* that the homestead was designed to accommodate, at least the three wives and all their children. It would appear for reasons not known by this Court but probably known by some members of the family council why this arrangement was not in place at the time of the demise of the late Robert Zwane. The decision to exclude from the compound or homestead the other wives and some of their children might appear, to the uninformed as we are, to be bad and harsh. But as pointed out, the reasons are unknown to this Court, hence the reasons may be justified if they were meant to preserve peace and harmony within and amongst the

wives and the children. We are not privy to such and it is an issue not before court. In passing, one may point out though that the authority that can change that decision is the *Inkosana* in consultation with the Zwane Family Council after reviewing the reasons for such a decision or if the mischief that was being averted no longer exists anymore. It must be born in mind that the *Inkosana*, unlike an *Indlalifa*, steps into the shoes of the deceased head of the family and its decisions are good as the decisions of the deceased head of the family. The decision of the deceased head of the family, depending on its impact, can be reviewed by Inkosana (now as if it was the deceased himself doing the review) or by *Umphakatsi* or the Siswati National Court if found unreasonable or uncalled for or have been overtaken by events.

[30] The decision or orders of the court *a quo* did not curtail or close the door, subject to the orders confirmed by this Court which are final, to pursue Siswati Law through the traditional structures. For removal of doubt, the litigants in this matter are at liberty to approach traditional structures on any aspect of this matter except on the orders that have been confirmed by this Court. For example, there are matters that are not covered by the orders of the court *a quo* as confirmed by this Court such as-

(a) the appointment of *Inkosana;*

(b) status or fate of the deceased's wives, their welfare or upkeep;

(c) the extent or boundaries of *indlu* or *likhaya laka la* Dlamini (Angellinah Dlamini) or whether it is the whole compound;

(d) the status of the other children who were at the time of the demise

of the late Robert Zwane were staying and occupying some of the houses in the compound;

(e) and such other issues that would be known by the family council as well as the litigants herein.

[31] *Orders of this Court*

In the result-

(a) The appeal is dismissed with costs.

(b) The orders of the court *a quo* are confirmed, namely-

1.1 That the First to fifteenth Appellants and anyone acting for or on their behalf, are hereby interdicted from harassing, threatening intimidating or assaulting any of the Respondents in any manner whatsoever in this matter;

1.2 That the first to fifteenth Appellants be and are hereby ordered to vacate the main house occupied by the Respondents and their mother prior to their eviction; to restore possession thereof to the Respondents and to hand over any keys and or any articles or contents of the main house; to desist from hindering the Respondents access to the homestead and possession of the said main house;

1.3 That the eighth Respondent is directed to procure and deploy adequate resources necessary for the security and the

enforcement of the orders as well as restoration and maintenance of peace at the Zwane premises; to do all necessary to ensure the due compliance and execution of the orders by the Appellants.

(c) In line with our analysis and conclusions, particularly our paragraphs [22]; [27] and [28] of this judgment, the Registrar shall remit this judgment to the Judicial Commissioner for him to ensure that all the issues pointed out in this judgment of traditional nature should be referred to and heard and concluded by Umphakatsi as soon as possible.

S.J.K. MATSEBULA
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

N.J. HLOPHE

JUSTICE OF APPEAL

For the Appellants:	A.C. HLATSHWAYO (SIBUSISO B. SHONGWE &ASSOCIATES)
For the Respondent:	N.D. JELE (ROBINSON BERTRAM)