CIVIL CASE NO.2653/99

IN THE MATTER BETWEEN:

CHIEF MAJAHANE DLAMINI **Applicant**

VS

PRINCE MKHAMBATSI DLAMINI **1st Respondent**
PRINCE MFUNWA DLAMINI **2nd Respondent**

CORAM **: MASUKU J.**
For Applicant **: Adv. L.M. Maziya (Instructed by Johannes Nkambule & Associates)**
For 1st & 2nd Respondents **: Mr Phesheya M. Dlamini**

JUDGEMENT
3/11/1999

This is an application brought under a Certificate of Urgency and in which the Applicant prays for *inter alia:*

1. That the Rules of Court in respect of form, manner of service and time limits be dispensed with and the matter be heard as one of urgency.

2. Restraining and interdicting the 1st Respondent or anyone acting under him from convening and conducting the meeting, of the Mkhuzweni Community scheduled for the 30th October, 1999, wherein 2nd Respondent is to be presented as Chief pending the finalisation of this matter.

3. That a *rule nisi* be and is hereby issued calling upon the Respondents to show

cause on a date to be fixed by this Honourable Court why an order in the following terms should not be issued;

3.1 declaring that the Respondents have no authority over the community of Mkhuzweni especially in matters relating to Chieftainship of the said area.

4. That prayer (2) should operate with immediate effect as interim relief.

5. Costs of this application

The Notice of Motion is signed by Mr O. Nzima of Maphalala Company on behalf of Jahannes S. Nkambule & Associates, the Applicant's attorneys. Of interest is the fact that Mr Bheki Maphalala of Maphalala & Company acted as Commissioner of Oaths in respect of the Affidavits filed on behalf of the Applicant. This is an unadvisable thing to do and is in my view improper. There must be no connection between the firm that signs and prepares the Notice of Motion and a member of the firm that signs as a Commissioner of Oaths. It is imperative that there must be no interest between the two.

I will however condone this irregularity in view of Mr Maziya's explanation that Mr Nzima was merely asked to append his signature because no attorney from Johannes Nkambule and Associates was available to sign the Notice of Motion, regard being had to the urgency. Furthermore, Mr Nzima signed oblivious to the fact that his principal had acted a Commissioner of Oaths, Mr Maziya further contended. In no wise should this be repeated under any circumstances. Attorneys must exercise caution and care in signing legal process on behalf of another firm. In particular, they must ensure that their firm has not been involved in the preparation or signing of the papers.

In the Founding Affidavit, the Applicant states that he is a Swazi Prince and Chief of Mkhuzweni area. He is a son to the late Prince Gija Dlamini, who was Chief of the area and had six (6) wives. He died in 1969. The Respondents are the Applicant's half brothers. The Applicant contends that a rumour began to circulate indicating that some members of the Applicant's inner council had met and resolved to introduce the 2nd Respondent as the new Chief of the area.

To this end, radio announcements were aired calling upon members of the Mkhuzweni community to attend a meeting for introducing the 2nd Respondent as Chief on the 30th October, 1999. The Applicant states that authority to call meetings in the area is his exclusive preserve, he having been the holder of the position of Chief since 1972 and performing all the duties associated with that office. The Applicant further states that he was presented to the community in 1971 but his instrument of appointment had not been issued eleven years later in 1982, the year of the demise of His Majesty King Sobhuza II.

The Applicant contends further that the 2nd Respondent's mother was not smeared with red ochre or lard, neither during his father's lifetime nor posthumously.
This according to the Applicant, constitutes a disqualification to the 2nd Respondent as a "wife" and by logical extension, disqualifies her from bearing a male child who could become a Chief.

The relief sought by the Applicant is an interlocutory prohibitory interdict restraining the 1st Respondent from convening and conducting a meeting for introducing the 2nd Respondent to the Mkhuzweni Community as aforesaid. The Respondents, who were represented by Mr P.M. Dlamini, raised certain points in *limine* and urged upon the Court to dismiss the application with costs. The points in *limine* are the following;-

(i) that the Applicant has failed to establish that he has *locus standi in judicio* to institute the proceedings. It was argued that the Applicant failed to annex an instrument in terms of which he was appointed to act as Chief. It was further pointed out that in the absence of such instrument, the Applicant should have, but failed to allege any customary rite that was performed to signify his appointment as Chief in terms of Swazi law and custom. In the absence of both, the Applicant clearly failed to establish his *locus standi*, Mr Dlamini further argued.

(ii) that the matter is not urgent or sufficiently urgent in the absence of relevant allegations. In particular, it was argued that the Applicant failed to state when the rumour began to circulate and what he did after he heard the rumour. Furthermore, the Applicant failed to state when the announcements were made, how many times they were made and what steps he took to address

that issue.

(iii) that the Applicant has substantial relief as provided in Section 7(4) of the Swazi Administration Order, 1998.

(iv) that the whatever order will be issued by the Court will be rendered *brutum fulmen* as the stable was locked after horses had already bolted. In other words, the very harm sought to be forestalled has already been occasioned and no prohibitory order of Court would assist the Applicant.

I will now proceed to deal with the points in *limine in seriatim.* I however find it apposite to mention that although no evidence was adduced to this effect, Counsel were *ad idem* that the meeting had not taken place on the scheduled date although the reasons therefor differ. I will accept Counsels instructions, bearing in mind that they are officers of this Court. This therefore renders it unnecessary for me to deal with the last point *in limine.*

(i) *locus standi in judicio*

It is correct that no instrument of appointment was annexed to support the Applicant's claim that he is Chief of Mkhuzweni. This Mr Maziya also concedes. It is also true that no customary rite has been alleged in respect of which the Applicant claims his Chieftainship. Mr Maziya argued, correctly in my view that that notwithstanding, the Applicant has been acting as Chief of the area since 1971, without any opposition. He has been recognised as the Chief over a period of twenty years and has commissioned some important national activities like Incwala.

In my view, the proper determinant of whether the Applicant has established *locus standi in judicio* is to be found in Van Winsen *et al* "The Civil Practice of the Supreme Court of South Africa ", Fourth Edition, Juta, 1997 at page 1079. There, the learned authors state as follows:-

> "*The applicant will have* ***locus standi in judicio*** *if the right on which he bases his claim for an interdict is one that he personally enjoys".*

There is no question that from the allegations contained in the Founding Affidavits, this litmus test is satisfied by the Applicant. He states amongst other things that the right to call meeting rests with him and that he enjoys free community labour in the fields and allowances attaching to the position of Chief. Accordingly, it is my considered view that the Applicant has *prima facie* established his *locus standi* to my satisfaction. This point in *limine* ought to fail therefor.

(ii) *Urgency*

Rule 6 (25)(a) and (b), which governs urgent applications, provides as follows:-

(a) In urgent applications the Court or a Judge may dispense with forms and service provided for in these Rules and my dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to the Court or Judge, as the case may be, seems fit.

(b) In every affidavit or petition filed in support of an urgent application under paragraph (a) of this sub-Rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

It is therefore clear that the Court has to use its discretion whether to jettison the normal procedures set out in the Rules and to hear the matter as one of urgency. This will depend upon the particular circumstances of the case, based on the allegations made by the Applicant in his Founding Affidavit. It is also clear that the provisions of (b) above are mandatory, it being sufficient for the Court to refuse to enrol a matter if the requirements of (a) have not been satisfied.

Mr Dlamini correctly attacked the alleged urgency in this matter. Firstly, the Applicant, in setting out the urgency stated as follows in paragraphs 6 and 7.

> "6. *A couple of days ago, a rumour has been circulating to the effect that some members of my family council (Lusendvo) had met and resolved that*

the 2nd Respondent is soon to be presented to the community of Mkhuzweni as a new Chief. After confirming these reports I then consulted Prince Tiga Dlamini who is the surviving senior male member of the family council ("lisokanchanti"). He expressed surprise that he had not been consulted and his consent had never been obtained despite the fact that his position demands that such a decision should not be taken without his consent.

7. From early this week the 1st Respondent has been making an announcement over the national radio calling upon all members of the Mkhuzweni community to a meeting to be held at Mkhuzweni on Saturday the 30th October, 1999. I then approached the Station Commander of Pigg's Peak Police station to seek his advice on the matter and whether he could use his authority to stop the anticipated meeting. He advised me that he could not stop the meeting without a Court Order. He also advised me to consider making counter announcement advising the community that as a competent authority of the area I knew nothing about the meeting and that people should not attend it.

I indeed made such an announcement through the Senior Prince Tiga Dlamini

Notwithstanding all the 1st Respondent persisted in his announcement. I then decided to approach my lawyers with the view to stopping the meeting through a Court Order."

In paragraph 6, the Applicant does not state when exactly he first heard the rumours. He is content only to say "a couple of days ago." This is insufficient. A couple of days is nebulous. It may mean a different numbers of days to different people. One of the factors to be decided in determining urgency is the time when the Applicant first knew of the harm he seek to forestall. If it appears that there was a long time before the application, then the urgency must be refused.

Furthermore, the Applicant does not disclose to the Court the steps, if any, he took to address the issue of the rumour. He appears to have been content to sit and let matters ride, hoping that the rumours were untrue. He subsequently confirmed the rumours, but he does not state

when that was. He also does not state what he did after being advised by Prince Tiga Dlamini that he had not been consulted. Even at that stage, he could have approached the Court for relief, but he did not. The issues relating to absence of relevant averments may not be embellished by Counsel in argument. These must appear *ex facie* the Applicant's papers.

What exacerbates issues for the Applicant is that he does not state the date when he became aware of the announcement over the radio. Had this been done, it would put the Court in a position where it could determine whether the Applicant treated the matter with the requisite promptitude. Furthermore, he does not say how many times the announcements ran and when the last day was. He was economical with the germane information. It must be borne in mind that the Rules afford a Respondent certain rights and time limits. Where those are jettisoned, it must be on the basis of compelling and cogent reasons fully set out in the papers. The Court must lean in favour of complying with the normal time limits set out in the Rules unless it is clear from the papers that irreparable harm will eventuate.

It is also not clear from the Applicant's papers when he approached his attorneys. These are in my view are all important missing allegations that would have assisted the Applicant in establishing the urgency. I thus find that the Applicant has failed to disclose the material allegations to place the Court in a position to conclude that the matter is urgent.

In regard to urgency, I can cite the following decisions with approval, as they correctly set out the correct approach to be adopted in such issues, namely, **HUMPREY H. HENWOOD v MALOMA COLLIERY (PTY) LTD AND ANOTHER CASE NO.1623/94** (per Dunn J.) and **H.P. ENTERPRISES (PTY) LTD t/a HEATHER'S FASHIONS V NEDBANK (SWAZILAND) LTD CASE NO.788/99** (per Sapire C.J.).

I thus uphold this point in *limine.*

(iii) *Other alternative suitable relief.*

Rule 6 (25) (b) above requires an Applicant to make allegations why he claims that he can not be afforded substantial redress in due course in urgent applications. Where some other remedy is available to the Applicant, the Court is likely to refuse to hear the matter as one of urgency.

In this regard, the Applicant states as follows at paragraph 12.

> "*I would not be afforded substantial redress in due course if the meeting was allowed to proceed on Saturday. A presentation of a person as Chief to the community is always taken as a strong indication that the family council (Lusendvo) has met and agreed on his candidacy. Such a candidate is immediately taken to the Ingwenyama for a formal appointment as Chief. In my experience I have never heard of such an appointment being subsequently reversed by the Ingwenyama. Infact the mere presentation would make the members of the community to start paying allegiance to the new Chief and I would thus suffer irreparable prejudice in that I would have lost all the privileges that attach to the office of a Chief, for instance, free community labour in the Chief's fields, allowances as determined by the Ingwenyama from time to time."*

Mr Dlamini, in response to the averments contained in paragraph 12 above referred this Court to the provisions of Section 7 (4) of the Swazi Administration Order No.6 of 1998, which reads as follows:-

> "*The Ngwenyama may, in accordance with customary law, at any time revoke the appointment of a Chief or competent authority*".

Mr Dlamini argued that should the meeting go ahead and the 2nd Respondent introduced as Chief to the community, then the Applicant would have a remedy in terms of this sub-section. I agree. If it is true that the 2nd Respondent does not qualify for chieftainship, then the Applicant would be entitled to place this matter to the Ngwenyama in terms of this Sub-Section.

In terms of the provisions of Section 7 (1), the Ngwenyama, shall, after consultation with the *Lusendvo* and in accordance with customary law, appoint a Chief. In my view, the power to appoint Chiefs lies with the Ngwenyama, who exercises this power after consultations with the *Lusendvo* concerned. If the *Lusendvo* in this case proceed with their intended action, that would not suffice to catapult the 2nd Respondent to the position of Chief without the

Ngwenyama's involvement. All the Applicant would have to do is to approach the Ngwenyama as aforesaid.

It is no answer to say, as alleges the Applicant, that in his experience, he has never heard of an appointment being subsequently revoked. One may not know what the situation has been hitherto but the Order ushers a new dispensation which makes revocation of appointments possible. This would include cases of Chiefs who have been appointed by the Ngwenyama in terms of Section 7 (1) of the Order. This is supported by the provisions of Section 9 (1) considered below.

Another Section which affords the Applicant a remedy is Section 9 of the Order, which reads as follows:-

9 (1) If any question arises as to whether:

(a) a person appointed under Section 7 is, under customary law, the rightful successor to the chieftainship, or is a fit and proper person to be so appointed;

(b) a person designated under Section 8, under customary law, the rightful person to be appointed as acting chief pending the appointment as acting Chief;

(c) other matters relating to Chieftainship,

The Ngwenyama may appoint a committee to inquire into the matter.

(2) On receipt of the report of the Committee appointed in terms of this section, the Ngwenyama shall determine the question, which has arisen, and make such decision for the purposes of Section 7 or 8 as he may deem appropriate.

The *lis* brought by the Applicant is one which falls within the ambit of the provisions of Section 9 (1) (a). The proper procedure is for the Applicant to place the matter before the Ngwenyama in the manner that matters are referred to the Ngwenyama at Swazi Law and custom and with which the Applicant must be well acquainted in view of his allegations that he has held the office of Chief for more than twenty years.

I therefore agree *in toto* with Mr Dlamini's arguments in this regard.

This point ought to succeed for other reasons as well. An applicant for interlocutory interdict must satisfy four requirements, namely

(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear is *prima facie* established though open to some doubt;

(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted;

(c) the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory relief. – See **C.B. Prest, "Interlocutory Interdicts, Juta & Co 1993, page 55.**

The Applicant has in my view failed to address these requirements in his papers. He has certainly dismally failed to satisfy the last two. My remarks in relation to the provisions of Rule 6(25)(b) regarding a substantial redress at a hearing in due course apply with equal force and should be regarded as having been specifically traversed herein. It is clear from the aforegoing that the Order provides alternative relief and renders him disbarred from obtaining interim relief.

In the result, I find for the Respondents regarding this point *in limine* as well.

I find it unnecessary to decide the question of this Court's jurisdiction, which I raised *mero motu.* This is in view of the conclusion I arrived at in respect of the other issues. I will also not consider the effect of the meeting not being held on the nature of the relief sought by the Applicant.

The Application is thus dismissed with costs.

T.S. MASUKU
JUDGE