IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 3685/06

In the matter between:

CHIEF MDVUBA MAGAGULA	**APPLICANT**
VS	
MBALEKELWA NDWANDWE	**1st RESPONDENT**
MSUNDUZA NDWANDWE	**2nd RESPONDENT**

CORAM: MAMBA J

FOR APPLICANT: MR. B. SIMELANE

FOR 2nd RESPONDENT: MR. N. JELE

JUDGEMENT
(The Ex tempore judgement was delivered on 20/10/06)

[1] This is an urgent application for a final interdict. The applicant seeks an order "interdicting and restraining respondents or any other person(s) under their control with the preparations for and burial of the late Chief

Madzanga Ndwandwe, from burying the said Chief Madzanga Ndwandwe at eNkambeni Area."

[2] The gist of the Applicant's contention is that he is the Chief of eNkambeni area and as such no one may be buried thereat without his consent and or approval. He states that he has not granted permission to the respondents or any other holding under them, to bury the late Chief at eNkambeni and no such permission has been sought from him.

[3] It is common cause that the late Chief Madzanga Ndwandwe (hereinafter referred to as the deceased) died on 7th October 2006. It is common cause further that the father of the Deceased, who was himself a Chief, is buried at eNkambeni area. It is also common cause that the Respondents intend to bury the deceased at eNkambeni where his father is buried and to that extent, the burial that the applicant seeks to interdict or stop is real.

[4] The Applicant filed this application with the Registrar of this court and served it on the second respondent on 19th October, 2006 and set the matter down for hearing, on an urgent basis, at 9.30 in the forenoon the next day. No proper service was made on the first respondent and there has been no appearance by him or on his behalf.

[5] The certificate of urgency accompanying the notice of motion is woefully deficient and inadequate in its content in motivation of the alleged urgency. It falls far short of what is required of it in terms of the relevant practice directive of this court. The attorney who signed it merely confirms

having read the applicant's papers and then

> "...submit(s) that good cause exists for the Honourable Court to dispense with the rules as to service and time to permit the Applicant to bring this application as a matter of urgency."

As can be seen, the certificate does not state why the matter is urgent and why the applicant thinks he may not be afforded adequate relief at a hearing in due course. These assertions should be contained not just in the applicant's affidavit alone but in the certificate as well.

[6] The applicant has stated in his founding affidavit that the matter is urgent because the burial has been scheduled to take place on Sunday 22nd October, 2006. Significantly though, he has not stated when he first learnt of or about the intended burial. The second respondent has stated, and this has not been denied by the applicant, that the deceased died on 7th October 2006 and the decision to bury him at eNkambeni was made public on 9th October, 2006. As this allegation has not been denied or challenged by the Applicant, I shall, for purposes of this application, accept it as a fact.

[7] Even accepting for a moment that the matter is now urgent because of the pending burial in two (2) days time, the applicant is not entitled in law to wait for over a week and then file this application at the eleventh hour and expect the respondents and the court to put aside everything else and attend to his application. It is unfair on the other litigants. In the present application, the 2nd respondent has been given notice of less than twenty four (24) hours. This is too short a period in the absence of an explanation by the Applicant why he could and did not file this application before 19th

October, 2006.

[8] The other difficulty in this application is the fact that the applicant has applied for a final interdict. The three requirements, which must all be present, for such relief are:

a)a clear right,

b)an infringement or well-grounded apprehension of violation of that right and

c)the absence of an alternative relief.

A final interdict as opposed to an interlocutory one, is granted "in order to secure a permanent cessation of an unlawful course of conduct or state of affairs." *(Interlocutory Interdicts, CB Prest at 46).*

See SETLOGELO v SETLOGELO 1914 AD 221 **APLENTI v MINISTER OF LAW AND ORDER AND OTHERS, 1989 (1) SA 195 (A), FOURIE v OLIVIER en 'n ANDER, 1971 (3) SA 274, MINISTER OF LAW AND ORDER, BOPHUTHATSWANA AND ANOTHER v COMMITTEE OF THE CHURCH SUMMIT OF BOPHUTHASWANA AND OTHERS, 1994 (3) SA 89 (BGD), FREESTATE GOLD AREAS LTD v MERRIESPRUIT (ORANGE FREE STATE) GOLD MINING CO LTD AND ANOTHER, 1961 (2) SA 505.** The court has a discretion to grant or refuse an interdict.

> "A final interdict is a drastic remedy and (probably largely for that reason) in the court's discretion. The court will not, in general, grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. An applicant for a permanent interdict must allege and establish, on a balance of probability, that he has not alternative legal remedy. ...It has been held, correctly it is submitted, that the discretion of the court, apart from the position relating to the grant of interlocutory interdicts, where considerations of prejudice and convenience are of importance, is bound up with the question whether the rights

> of the party
>
> complaining can be protected by any other ordinary remedy." (CB Prest, Interlocutory Interdicts at 49 and 52).

[9] The second respondent has denied that the applicant is a Chief. Second respondent avers that the applicant is a mere Indvuna. The argument is taken further by saying that because the applicant is not a Chief, he has no land that is under his command and in particular he has no jurisdiction over ENkambeni area where the deceased is due to be buried. The Applicant has not replied to this assertion by the second respondent. Whether or not the applicant is a Chief of eNkambeni is central to his case. If he is the Chief of the area, he has a right over it and its use as per the dictates of Swazi law and custom. However, the applicant must not just show that he is a chief. He must go further and show that the area in question falls under his jurisdiction.

[10] The second respondent has stated that eNkhambeni falls under the jurisdiction of the deceased. The respondent states further that the father of the deceased is buried on the same mountain where the deceased is due to be buried. It is also common ground that the deceased has a homestead known as Lilawu at eNkhambeni. These two facts do not, in my view, lend support to the applicant's case.

[11] The other major difficulty faced by the applicant herein is the fact that the area in question has, even on the applicant's own showing, been the subject of a chieftancy dispute between the applicant and the deceased and his followers. The dispute has been the subject of litigation in this court and the Supreme Court where the court ruled that it was a matter to

be dealt with by the appropriate authorities under Swazi Law and Custom. This application is, in my judgement, a back-door attempt by the applicant to circumvent that court order and resurrect his claim over the disputed land - eNkhambeni. This court is not prepared to accede to his demands. From all this, it is clear to me that the land in question is being contested by the parties or their subjects herein. It is a land dispute by two Chiefdoms. This is not the proper forum for it. The applicant has thus failed at the first hurdle - to prove a clear right. If he has failed to show a clear right, it follows that he has failed to satisfy this court that he is entitled to the relief that he seeks.

[12] Therapplication was accordingly dismissed with costs.

MAMBA J