

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2509/07

In the matter between:

LINDIWE SIMELANE

APPLICANT

v

DAY DLAMINI

1st RESPONDENT

NESTER MABASO

2nd RESPONDENT

CHIEF MBHOKE MAMBA

3rd RESPONDENT

NTFONJENI DLAMINI

4th RESPONDENT

CORAM

Q.M. MABUZA -J MR.

FOR THE APPLICANT FOR

L.M. SIMELANE MR. V.

THE RESPONDENT

KUNENE

RULING 2/11/07

[1] The Applicant has brought this matter on a certificate of urgency for *inter alia* a spoliation order and costs.

[2] The Respondents have moved an application for the appointment of assessors in terms of the Section 6 of the High Court Rules and that oral evidence be led because there are material disputes that cannot be resolved on the papers filed off record.

[3] Mr. Simelane for the Applicant submitted that there was no need to have assessors appointed herein. He also submitted that even if there was such a need, it is only the Court which had the jurisdiction to make this suggestion and not the Respondents.

[4] While I may be sympathetic to Mr. Simelane's submission I find nothing wrong in the Respondents nudging the Court in a particular direction which will be of assistance to itself.

[5] The matter before this Court involves complex customary issues which require the expertise of persons knowledgeable in Swazi law and custom. It is my considered view that this Court cannot take judicial notice of the umcwasho rite without a formal inquiry which will involve the giving of evidence in regard thereto. Once judicial notice is taken of this rite it will not have to be proved in a later case, but will become precedent.

Unless of course such judicial notice has already been taken and the Court is unaware of it.

[6] The Applicant has also raised the very important issue of her Christian beliefs. This issue impacts on her fundamental constitutional right to freedom of conscience and religion espoused in Section 23 of the Constitution Act, 2005 which provides for the protection of freedom of conscience or religion.

[7] The Umcwasho rite and her religious beliefs have an impact on Section 252 (2) (3) and (4) of the Constitution Act, 2005 which provides as follows:

"(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.

"(3) The provisions of sub-section (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may -

(1) provide for the proof and pleading of the rule of custom for any purpose;

(2) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and

(c) provide for the resolution of conflicts of customs or conflicts of personal laws.

[8] Parliament has not yet complied with Section (4) hereinabove, however, this Court can still proceed to have the rite proved in terms of the common law which is provided for in Section 252 (1) which states:

(1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common

Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.

[9] It is apparent from the foregoing that there is need for the interpretation of certain constitutional provisions and this exercise will require a full bench of the High Court.

[10] The above issues are very important and need to be decided for posterity as well as judicial precedent. They cannot be decided on the papers before me.

[11] Finally the matter is fraught with disputes of fact. These disputes of fact need to be ventilated by vive voce evidence. For example paragraph 8 of Chief Mbhoke Mamba's answering affidavit reads thus:

"The contents of these paragraphs are admitted for purposes hereof. May I further state that the reason this matter was referred to me was because, when the custom was introduced all Chiefs were summoned to the Ludzidzini Royal

Kraal by the King, where we were given power to rule and judge over the Umcwasho ritual as to how those who disobeyed the ritual were to be fined".

The Applicant has responded in her replying affidavit at paragraph 5 as follows:

"I deny that chiefs were given judicial powers to rule, judge and fine those who disobeyed Umcwasho ritual. The 3rd respondent is put to strict proof thereof.

Clearly the above paragraphs raise disputes of fact that can only be clarified by leading oral evidence. These paragraphs also require the assistance of assessors.

[12] In the circumstances I order as follows:

- (a) That the matter be heard with the assistance of assessors.
- (b) That oral evidence be heard in order to properly determine all the issues in the matter.

(c) That the matter is referred to a full bench as the Chief Justice may deem fit.

(d) Costs are hereby reserved

O.M. _____