



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No.1852/2015

In the matter between:

**THABILE PATRICIA MKHALIPHI**

Applicant

**VS**

**PATRICK MPHATHI MHLANGA & OTHERS**

Respondent

**Neutral citation:** *Thabile Patricia MkhaliPhi vs Patrick Mphathi Mhlanga (1852/2015) [2015] SZHC 209 (7 December 2015)*

**Coram:** FAKUDZE, J

**Heard:** 27 November, 2015

**Delivered:** 7 December, 2015

*Reasons for ex tempore judgment delivered on 27/11/2015.*

**Summary:** *Civil procedure – A matter pending before NDABAZABANTU (Kings Liason Officer) cannot be adjudicated upon by the High Court – Applicant should have approached the Court by way of Review in terms of the Rules of the Court instead of seeking a*

*declaratory order - Application is dismissed with no order as to costs.*

### **JUDGEMENT**

[1] Applicant filed a Notice of Motion on a certificate of urgency seeking an order in the following terms:

1. Setting aside and or nullifying the purported order of the 2<sup>nd</sup> Respondent dated 25<sup>th</sup> November, 2015;
2. That the order of the 2<sup>nd</sup> Respondent dated 25<sup>th</sup> November, 2015 be and is hereby declared null and void and of no force and effect.
3. That the Respondents be and are hereby interdicted and restrained from interfering with the lobola function to take place at Malkerns area at the Applicant's homestead;
4. That members of the Royal Swaziland Police Force based at Malkerns Police Station be ordered to ensure that peace prevails during the function;
5. Costs of suit;
6. Further and/or alternative relief.

[2] All the Respondents were served with the application and 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their Notice of Intention to Oppose. They were represented by the Office of the Attorney General.

[3] Applicant's case is that she is the maternal mother of Nomfundo Pamela Mhlanga who resides with Applicant at Malkerns area. The 1<sup>st</sup> Respondent is the father of Nomfundo and he resides in Ngwane Park with his wife. Applicant and 1<sup>st</sup> Respondent gave birth to Nomfundo before getting married and they later on married in 1994. Nomfundo was born in 1988. Applicant and 1<sup>st</sup> Respondent entered into a Civil Rites marriage.

[4] During the subsistence of the marriage, Applicant alleged that 1<sup>st</sup> Respondent deserted her and got married to the wife with whom they are currently staying together at Ngwane Park. In 2009 Applicant and Respondent got divorced and

Applicant continued staying with the children at Malkerns. Applicant was responsible for their maintenance and to provide for their school fees.

- [5] Applicant avers that in August, 2015 Nomfundo informed her that her boyfriend wanted her hand in marriage and wanted to pay lobola. 1<sup>st</sup> Respondent was informed in the same month and also all the other extended family members of the Mhlanga and Mkhaliphi family. Applicant alleges that she informed the 1<sup>st</sup> Respondent because he is the father of Nomfundo.
- [6] An agreement was reached that the lobola ceremony will take place at Applicant's homestead at Malkerns on the 27<sup>th</sup> November, 2015.
- [7] On the morning of the 25<sup>th</sup> November 2015 at around 7.30 a.m. Applicant alleges that she was served with a letter dated 24<sup>th</sup> November, 2015 by members of the police force based at Malkerns requesting her attendance before the 2<sup>nd</sup> Respondent on the same day.
- [8] Applicant informed the officers that she would not make it because it was too short a notice and that she was on her way to work at the Psychiatric Mental hospital. On that evening she was served with a letter from 2<sup>nd</sup> Respondent. On the 26<sup>th</sup> November, 2015, Applicant received another letter from the Fourth Respondent which was a covering letter directing the 3<sup>rd</sup> Respondent to assist to ensure that the lobola function does not proceed.
- [9] Counsel for Applicant argues that the Second Respondent has no right whatsoever nature in law to make the purported order which is the dispute of this litigation. The 2<sup>nd</sup> Respondent is just a Liason Officer who mediates between parties who have submitted to his jurisdiction. Counsel further argues that 2<sup>nd</sup> Respondent has no power or right to exercise any judicial powers. Applicant cites the case of **Maziya Ntombi v Ndzimandze Thembinkosi Civil Appeal Case No. 02/12** as his authority for this proposition.

- [10] Counsel for Applicant further argues that the purported order dated the 25<sup>th</sup> November 2015 has no force and effect in law and the 2<sup>nd</sup> Respondent could not issue such orders. He therefore requests the High Court to set aside the purported order in view of the fact that now they seek to use members of 3<sup>rd</sup> Respondent to interfere with the function to take place over the weekend at Applicant's homestead.
- [11] Counsel for Applicant finally argues that he wonders how 3<sup>rd</sup> and 4<sup>th</sup> Respondents come into the picture because the order is being sought against 2<sup>nd</sup> Respondent.
- [12] 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Counsel argues that the way the Application has been brought before the court is a cause for concern. 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Counsel alleges that they were served with the Application very late and did not have time to even file an Answering Affidavit. He nevertheless, continued to argue the matter.
- [13] 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Counsel argues that the Attorney General's office has an interest in the matter because not only is the Application directed to 2<sup>nd</sup> Respondent but it is also directed to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. As far as the 2<sup>nd</sup> Respondent is concerned, he is appointed by the King as Liason officer and he also works under the supervision of the Regional Administrator. He is therefore part of the Government structure and is entitled to legal representation by the office of the Attorney General.
- [14] Counsel further argues that Applicant should have approached this Court by way of review because in terms of Section 151 (3) of the Constitution, 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. Counsel referred to the case of the **Commissioner of Police and Attorney General v Mkhondvo Aaron Maseko Civil Appeal No. 3/2011** as his authority. Counsel therefore submits that the Application should be dismissed.
- [15] During the hearing of the Application, the Court enquired from Counsel for Applicant that seemingly the contents of the purported order suggest that the

matter is still pending. All that the King's Liason Officer is saying is that the lobola be stayed until a resolution to the dispute is found. Applicant's Counsel insisted that the order is final; that is why Applicant has brought the Application for the purported order to be set aside.

[16] The Court further indicated that if the Applicant insists that the order by the King's Liason Officer is final, Applicant should have approached this Court by way of review. Counsel's Applicant insisted that the correct procedure has been used. The court made an *ex tempore* judgment at the conclusion of the argument by Counsel for both parties. It dismissed the application and on the issue of costs, no order was made.

[17] In my judgment, I will address four issues and these are (a) the representation of 2<sup>nd</sup> Respondent by the office of the Attorney General, (b) the legal position of Ndabazabantu (c) the issue of *lispendens*/pending litigating and (d) the procedure that was adopted by Applicant when launching the Application. On the first issue, it is the Court's considered view that 2<sup>nd</sup> Respondent has the right to be represented by the Attorney General's office. This view emanates from the observations made by His Lordship Maphalala M.C.B, Justice of the Supreme Court in the matter of **Maziya Ntombi v Ndzimandze Thembinkosi Civil Appeal Case No. 2/2012** where His Lordship observed that-

***“However the King's Liason Officer or Ndabazabantu is a recognized functionary established in terms of Swazi Law and Custom; he is appointed by Ingwenyama and is answerable to the Regional Administrator.” p12***

[18] The fact that the Liason Officer is a recognized functionary that is answerable to the Regional Administrator suffices to establish his right to be represented by the office of the Attorney General. If the Attorney General can represent the Regional Administrator, why should the Attorney General not represent a person who is answerable to him?

[19] The second issue is the legal position of the King's Liason Officer or Ndabazabantu. The legal position is also clearly spelt out by His Lordship

Maphalala M.C.B, Justice of the Supreme Court in the matter between Maziya Ntombi v Ndzimandze Thembinkosi (Supra) where His Lordship stated in page 12 that-

***“However the King’s Liason Officer or Ndabazabantu is a recognized functionary established in terms of Swazi Law and Custom; he is appointed by Ingwenyama and is answerable to the Regional Administrator. He doesn’t exercise judicial power. His function is that of a mediator or peace maker between rival parties. His decisions have no force of law and their legitimacy and compliance depends on the willingness of the parties to abide by them. In deciding a dispute he applies Swazi Law and Custom.”***

[20] It is this Court’s humble view that 2<sup>nd</sup> Respondent is a recognized functionary established in terms of Swazi Law and Custom and that matters may be referred to him for mediation and/or for peacemaking.

[21] The third issue pertains to *lispendens*. This Court holds the view that Applicant approached this Court prematurely since, in its humble view, the matter was still pending before the King’s Liason Officer. It is common cause that a dispute between Applicant’s family and 1<sup>st</sup> Respondent’s family was reported to the King’s Liason Officer on the 25<sup>th</sup> November, 2015. Applicant could not make it to this meeting for reasons stated in paragraphs 16 and 17 of the Founding Affidavit where Applicant states that -

***“16. On the morning of the 25<sup>th</sup> November 2015 at around 7:30 A.M. I was served with a letter dated 24<sup>th</sup> November, 2015 by members of the police force based at Malkerns requesting my attendance before the 2<sup>nd</sup> Respondent on the same day.***

***“17. I informed the officers that I would not make it because it was short notice and I was actually on my way to work at the Psychiatric Mental Hospital on that morning.”***

- [22] The reasons why Applicant could not make it to the meeting with 2<sup>nd</sup> Respondent are clear. She says that the invitation was on short notice and that she was actually on her way to work when the invitation was received by her. There is no indication in Applicant's papers that she objected to the matter being mediated upon by the 2<sup>nd</sup> Respondent. This is the true position notwithstanding that Applicant's Counsel argued from the Bar that Applicant did not attend because she had problems with the matter being heard by the King Liason Officer who has no right in law to make orders.
- [23] This Court is inclined to hold the view that the matter is *lispendens*. In Annexure B (which is the purported order), 2<sup>nd</sup> Respondent makes it clear in the first paragraph that he has taken all reasonable steps to ensure that the matter between the Mkhaliphi and Mhlanga is resolved. He further says that lobola should not continue until the matter between the two families is finally resolved. All that the 2<sup>nd</sup> Respondent is saying is that an interim measure be put in place pending the resolution of the matter. The basis for this interim measure is highlighted in the second paragraph where 2<sup>nd</sup> Respondent spells out the customary procedure in respect of a lobola ceremony. This procedure is that those who have the right to determine where the lobola negotiations and/or bride price should be, is determined by the family of the girl's father, in this case, being the 1<sup>st</sup> Respondent. I agree with Applicant's Counsel that the Liason Officer has no judicial power. In this case however, the matter is still pending and it cannot be said the 2<sup>nd</sup> Respondent exercised any judicial power
- [24] In any event, even if Applicant's Counsel holds the view that the matter has been finalized by the King's Liason Officer, the Applicant has failed to take the matter up with the Regional Administrator. After all, the *Ntombi Maziya's case (Supra)* makes it clear that the King's Liason officer is answerable to the Regional Administrator. The term "answerable" suggests that he is accountable for everything the Liason Officer does to the Regional Administrator.
- [25] The last issue is that of the procedure used in launching this Application. 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Counsel argues that the procedure adopted is in violation of Section 151 (3) of the Constitution. I disagree with this contention or argument.

Applicant is correct in arguing that the King's Liason Officer does not form part of the Swazi Court structure. Although he invokes Swazi law and Custom in mediating disputes between parties that have submitted to his jurisdiction, he does not do so as a Swazi Court.

[26] This Court wishes to observe that the procedure that should have been adopted by the Applicant in launching this Application should have been by way of Review in terms of Rule 53 of the High Court Rules. The Court would have been in a position to determine if there were irregularities in the manner the matter was adjudicated upon by the Liason Officer.

[27] In the light of all that has been said above, it is this Court's humble view that the Application be dismissed and it is accordingly dismissed. No order as to costs is made.

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**M.R. FAKUDZE**

**JUDGE OF THE HIGH COURT**

Applicant: O. Nzima

1<sup>st</sup> Respondent: No Representation

2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents: V. Kunene