

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No.1801/2017

BONIFACE SIGWACA ZWANE

Applicant

And

CHIEF MATATAZELA DLAMINI

1ST Respondent

MDOLOZA AMOS LULANA

2ND Respondent

TIMOTHY MABUZA

3RD Respondent

SELBY DLAMINI

4TH Respondent

LUCKY MAPHANGA

5TH Respondent

MGAZI NTSHANGASE

6TH Respondent

SITANI MDLULI

7TH Respondent

VELAPHI DLAMINI

8TH Respondent

GCEBILE SHONGWE

9TH Respondent

THE ROYAL SWAZILAND POLICE

10TH Respondent

THE ATTORNEY GENERAL

11TH Respondent

Neutral citation : *Boniface Sigwaca Zwane v Chief Matatazela Dlamini and 10 Others (1801/17) [2019] SZHC 158 (16th August, 2019)*

Coram : M. Dlamini J

Heard : 18th July, 2019

Delivered : 16th August, 2019

Procedure : *Applicant denying meeting of 21st October, 2017 in the replying affidavit – applicant testifying of the meeting of 21st October, 2017 – by so doing causing court to refer matter to oral evidence – cost met our cost order against applicant as matter was unnecessarily referred to oral evidence*

: *Applicant changing his causa from violation of right to hearing to unfair hearing – court disallowing same as akin to litigation by ambush*

Summary: The applicant laments a violation of his right to hearing by first respondent and his inner-council. The respondent disputes any violation.

The Parties

[1] The applicant is an adult male of Ngonini area in the District of Manzini and a subject of 1st respondent. The 1st respondent is the chief of Nhlambeni area. The 2nd to 9th respondents are all members of the inner council of Nhlambeni area. The 10th respondent is cited for purposes of serving court process. The 11th respondent is the legal representative of all the other respondents.

The prayers

[2] The applicant has prayed *inter alia*:

- “3. *Reviewing and setting aside the Respondents decision of the 4th November 2017 calling upon the applicant to pay a fine which is equivalent to six (6) cattle within twenty-one (21) days, one (1) of which was suspended on condition that applicant is not found to have committed any offence pertaining to land.*¹
4. *Staying Execution of the decision of the Respondents’ of the 4th November 2017 calling upon the Applicant to pay a fine which is equivalent to six (6) cattle, one (1) of which was suspended on condition that applicant is not found to have committed any offence pertaining to land pending finalization of prayer one above.”*

Genesis

[3] The matter came before me on motion proceedings. It was heard. I issued a written ruling that it be referred to oral evidence. It is unnecessary for me therefore to highlight the parties’ pleadings as I did so in my judgement delivered on 17th July, 2018. What remains for me is to ascertain from the evidence as a whole whether the applicant was granted his right to be heard prior to the impugned decision of 4th November, 2017 by 1st respondent’s inner-council..

¹ Page 5 para 3 & para 4

Applicant's Oral Evidence

[4] The applicant testified in his own case. He informed the court that prior to the 21st October, 2017, he received a message from one **Timothy Zwane** that he had been instructed to accompany him to the chief's kraal, Nhlambeni. On 21st October, 2017, he duly proceeded to the chief's kraal. He found many people, about forty. Among the people, he found members of the **Zwane** family, some of which were his extended family. They were asked to assemble at a structure referred to as Gogo Centre, a structure for orphans and vulnerable children.

[5] He then testified:

*“Without thanking **Mfan’mpela Timothy Zwane** for that he has brought me to the Royal Kraal, the headman **Amos Lulane** reported that the previous Saturday they went to my parental homestead and found me having grated a piece of land to build a house.”*

[6] The applicant proceeded:

*“When he narrated the matter, I was called to respond to whether it was true or not. I responded that it was not true that I did not report. I reported to the inner-council and the headman that I had reported to **Timothy Mabuza** who is the forerunner.”*

[7] He proceeded to testify that at that meeting, **Elias Zwane** was present. He, **Elias Zwane**, requested that the matter be discussed at family level. He requested to report it to his aunty who is a wife of a prince at Lobamba.

They then left and proceeded to their aunt. Their aunt was to send someone to the Nhlambeni Royal Kraal to explain that the piece of land where construction was undertaken belonged to applicant's parents. However, the Nhlambeni Inner-Council never gave them the chance to deliver such message. AW1's evidence was lengthy as he testified on irrelevant matters. He was cross-examined. I shall refer to his cross-examination later herein.

[8] **Elias Elphius Zwane** was AW2. He identified the applicant as his brother. On 21st October, 2017, applicant requested him to accompany him to the Nhlambeni Royal Kraal. In the company of **Mfanimpela Zwane**, their father and other members of the **Zwane** family, they proceeded to Nhlambeni Royal Kraal. At the Royal Kraal, the Inner-Council summoned them to Gogo Centre.

[9] The Inner-Council explained as to why they had summoned them to the Royal Kraal. They enquired from applicant as to why he had built a structure without the permission of the Royal Kraal. Applicant responded by saying that the land he had built the structure on belonged to his parents. He also pointed out that before he cleared the land, he reported the same to **Mr. Timothy Mabuza**.

[10] AW2 then testified:

*“One of the speakers from the **Zwane** family then said, applicant has built on his piece of land. On that reason I then requested from **Indvuna** that we should deliberate the matter at family level.”*

- [11] It was his further evidence that someone from the crowd enquired if he was the rightful person to ask that the matter of whose piece of land was should be deliberated at family level first. He did not respond. **Inkhosikati laNgozolwane** replied, saying that his request should be granted. The Inner-Council directed him to report on the following Saturday, 28th October, 2017. The meeting was dispersed.
- [12] He did go to his aunt at Lobamba who advised him that he should call **Simanga Zwane** as she needed to speak to him first about the matter. She would summon the rest of the **Zwane** family at **James Zwane's** homestead. The meeting was to take place on 28th October, 2017. On 28th October, 2018, he went to the Royal Kraal to report his aunt's intentions. However, the Inner-Council would hear nothing. They threatened him with arrest as they believed the evidence of another witness who advised the Inner-Council that AW2 was telling an untruth. Applicant was disallowed by Inner-Council to attend that meeting.
- [13] On 4th November, 2017, he again went with applicant to the Royal Kraal. The Inner-Council delivered its verdict against applicant and ordered him to pay six herd of cattle. The applicants' case was closed after cross-examination.
- [14] The respondents opened their case by calling to the witness stand **Mr. Amos Mtolozi Mlulane**. He is the headman. Before the 21st October, 2017, the Inner-Council sent a number of emissaries to order applicant to stop constructing on the said piece of land. However, applicant did not stop.

[15] They enquired from each emissary whether they did deliver the order to applicant. Each agreed. They then sent the chief's runner to enquire from applicant as to why he was proceeding with construction. Thereafter, they sent **Mfanimpela Zwane** to summon applicant to report at the Royal Kraal on 21st October, 2017. Applicant obliged. The matter was deliberated upon. They asked him if a number of emissaries have delivered the message that he should stop construction. They confirmed that each did. It was asked why then applicant continued with construction. They learnt that the building materials had been ordered prior.

[16] He then testified:

“When the charges were levelled, applicant stated that he did not see how he was wrong as the piece of land belonged to his parents and he had reported to the chief’s runner.”

[17] The Inner-Council however, found that applicant was on the wrong. One of the **Zwane** family then requested that the matter be deliberated at family level. His request was acceded to. He was directed to report to the Inner-Council on 28th October, 2017. On 28th October, 2017, AW2 arrived. He reported that the family failed to meet. This was the end of the matter. On 4th November, 2017 the Inner-Council called upon applicant and issued a verdict. It fined him six (6) herd of cattle and one was suspended on condition that he did not touch the piece of land.

[18] RW2 was **Timothy Elias Mabuza**, the chief's runner. He said that he was sent to order applicant to desist from constructing. Applicant had cleared a piece of land without reporting to the Inner-Council. Applicant had called him saying that he had cleared the land. He thought that applicant had cleared at his homestead whereas he had cleared a virgin land adjacent to his homestead. He then went to applicant and informed him that he was wrong in so doing. However, applicant persisted with the construction. He was present at the Royal Kraal on the 21st October, 2017. However, due to his ill health, he did not attend the meeting between applicant and his family and the Inner-Council.

[19] RW3 was **Johannes Kokoma Zwane**. He identified applicant as his own son, owing to extended family ties. Applicant cleared a piece of land. He sent a child to enquire if he had reported to the Royal Kraal or knew what he was doing. Applicant told the child to tell him that if he had an issue, he should approach him directly. He did not.

[20] Applicant continued to construct on the disputed piece of land in defiant. In the meeting of 21st October 2017, the headman asked him why he had constructed on the piece of land without the Royal Kraal's permission. Applicant lamented and said that **Mabuza** had let him down. This witness advised the Inner-Council that the said piece of land belonged to him. This witness was not cross-examined while RW1 and RW2 were.

Adjudication

Issue

[21] The bone of contention was stated by applicant as follows:²

“32. *Indeed, I arrived at the Umphakatsi on the 4th of November, 2017 where I was informed amongst others that I had disrespected libandla by clearing, fencing and constructing a foundation without their consent. I was further informed that despite libandla telling me to stop I refused.*

36. *After having been informed about the allegations, I was then informed that I should pay one (1) beast for my brother’s debt to the said Simelane, Five (5) beast for clearing the land, fencing, constructing the foundation and proceeding despite being told to stop within twenty-one (21) days. One (1) beast was suspended on condition that I am not found in a land controversy again.*

39. *The conduct of the Respondents’ was unconstitutional as it infringed upon my rights as envisaged in Section 21 (1) of the Constitution Act (1/2005) as I was never afforded a hearing before the decision to order me to pay five (5) beasts within twenty-one (21) days was taken.”*

[22] Was the applicant afforded a hearing? This poser must be answered from the evidence adduced.

² Page 21 para 32, 36 and para 39

Determination

[23] It is the cardinal principle of justice that every man must be afforded a hearing before a verdict can be entered against him. Firstly, I must mention that throughout his founding affidavit, applicant never mentioned the meeting of 21st October 2017. In the answering affidavits, the respondents alluded to the meeting of 21st October 2017. The respondents averred:³

*“13.2 During the inspection I sent the Third Respondent to go and ask the Applicant to come to site and was not found at his homestead. While still at the site **Timothy Zwane** arrived and was advised to tell the Applicant that he was being summoned to appear before the Chief’s Inner Council on the 21st October 2017 to answer in regard to the construction that was taking place on the piece of land in issue.*

*17.1 Contents of these paragraphs are denied. The Applicant was summoned to appear on the 21st October 2017, he did honoured the invitation of the Inner-Council accompanied by **Elias Zwane** and **Timothy Zwane**. On this date the hearing was conducted.*

*17.2 The Applicant was well aware of the matter he was summoned for and he during the hearing Applicant was given an opportunity to say whatever he wanted to say in response to the charges against him. In his own words the Applicant said that he did not see why he had to report such construction to the Royal Kraal as the land belonged to the **Zwane** family.*

³ Page 36 para 13.2 and page 37 para 17.1-17.4

17.3 *Elias Zwane on behalf of the Applicant requested that the Zwane family be given a chance to engage the Applicant and resolve the matter as a family. The Inner Council allowed the Zwane family to go and deliberate on the matter and they were advised to report the outcome on the 28th October, 2017. The final verdict was postponed to the 4th of November, 2017.*

17.4 *On the 28th October, 2017 Elias came back and said that as a family they have failed to resolve the matter and it was up to the Inner Council to take a final decision. Applicant continued with the construction even though he had been advised during hearing to stop. On the 4th November Applicant appeared before the Inner Council and Applicant was told of the final decision of the Inner Council.”*

[24] In his replying affidavit, applicant stated:⁴

“AD PARAGRAPH 13

18. *Contents hereof are denied and Respondent is put to the strict proof thereof. I reiterate the contents of my Founding Affidavit.*

AD PARAGRAPH 17-19

24. *The contents of this paragraphs are denied and the Respondent is put to strict proof thereof. I reiterate the contents of my Founding Affidavit pertaining to this issue to be incorporated herein and read as if specifically averred herein.*

⁴ Page 55 para 18 & page 56 para 24 - 27

25. *I deny that I was ever given a hearing and neither was I given a chance to make my representations concerning the allegations made against me.*
26. *I went there solely for purposes of ascertaining the motive behind their visit when they arrived in my absence at my homestead and after having been advised by **Elias Zwane** that I was being summoned, and that was without disclosing the nature of my required attendance.*
27. *I submit that the Respondents are not being candid with the truth and to demonstrate that, they have failed to furnish my attorneys with the record of proceedings despite several correspondences to this effect. I refer the above Honourable Court to the correspondence requesting the record of the proceedings and the response thereto marked "**BSZ2**".*

[25] Surprisingly, though applicant testified:

*"I confirm I was not given a hearing before the decision was issued. On 21st October 2017 I received a message before that date through **Timothy Zwane** saying he had been instructed to bring me to the Royal Kraal of Nhlambeni. When I reached the Royal Kraal we were about plus - 40 people. We were called to Gogo Centre where the Inner-Council without thanking **Mfan'impela Timothy Zwane** that he had brought me to the Royal Kraal, the headman **Amos Lulane** reported to the crowd that the previous Saturday they went to my parental homestead and found me having cleared a piece of land to build a house."*

[26] The applicant proceeded:

*“When he narrated the matter I was supposed to respond whether it was true or false. I replied saying it was not true that I did not report. I reported to the headman that I had reported to **Timothy Mabuza** who is the Chief’s runner.”*

[27] On this piece of evidence alone, the averments at paragraph 23 cited above fell from the very applicant. Applicant was later cross-examined:

Mr. K. Nxumalo : *“You were called by the inner-council on 21 October 2017?”*

Applicant : *“Yes.”*

Mr. K. Nxumalo : *“You were told of what you had wronged i.e. cleared piece of land without reporting to the inner-council”*

Applicant : *“Yes”*

Mr. K. Nxumalo : *“You told the court they asked you questions and you responded to that?”*

Applicant : *“Yes.”*

Mr. K. Nxumalo : *“You were accompanied by Elias Zwane your brother?”*

- Applicant* : “Yes”
- Mr. K. Nxumalo* : “He addressed the inner-council on that day?”
- Applicant* : “Yes he did say something.”
- Mr. K. Nxumalo* : “You told court you were given the chance to state your side of the story?”
- Applicant* : “I was not given the opportunity to state for the following reasons:
- a) On this day the inner-council was complainant and presiding officer in the matter. If there was a matter there ought to have been a complainant and myself.”
- Mr. K. Nxumalo* : “You are now changing completely from the matter as in the papers before court. You are now saying there was unfair hearing and not that you were not afforded a hearing.”
- Applicant* : “I was not afforded a hearing.”

[28] The last question posed by Learned Council for respondent was directly on point. The applicant having testified in-chief how he was afforded a hearing, on cross-examination decided to bring out a complete *causa*. He

could not be allowed to do so in terms of procedure as the respondents came to court prepared to answer on allegations of failure to afford applicant a hearing before passing their verdict. To allow applicant to change and testify on unfair hearing would be akin to allowing litigation by ambush. The law does not countenance such litigation.

[29] The version of 21st October, 2017 was corroborated by AW2, applicant's own witness. He testified about 21st October, 2017:

"The inner-council told applicant why they had summoned him to the Royal Kraal?"

[30] Further questions posed by the Inner-Council can be inferred from applicant's responses as testified by RW2:

"He (Applicant) answered saying that he had constructed the structure he was building on his parental homestead. He said before he cleared the land, he reported to someone i.e. Mr. Mabuza Timothy."

[31] He was cross-examined:

Mr. K. Nxumalo : *"Your request had nothing to do with the offence which was constructing without obtaining permission."*

AW2 : *"Yes but I wanted clarity on whose piece of land this one was."*

[32] On this response, it is clear that the applicant was given a hearing. His denial of the meeting of 21st October, 2017 in the pleadings and later on *viva voce* evidence testifying about its occurrence, goes to discredit his demeanour. It is further my considered view that the respondents ought to have closed their case without leading of oral evidence as applicant's case fell from the onset, thereby tilting the scales of justice at their favour.

Costs

[33] As already mentioned, this matter was first argued on motion. Owing to applicant profusely denying the meeting of 21st October, 2017 in his replying affidavit and having not mentioned it in his founding affidavit, the court ruled that the matter was fraught with disputes of facts. It referred it to oral evidence. I have already demonstrated from the on-set how applicant in his evidence-in-chief testified about the meeting of 21st October, 2017 despite his denial of its existence in his replying affidavit.

[34] When confronted under cross-examination, he decided to change and testify on unfair hearing, a case not supported by his pleadings. I must mention that, "*A commission of enquiry is not bound by the rules of evidence applicable to a court of law. Commission is entitled to adopt its own procedure, including the receipt of evidence or information relevant to the issue before it. A commission is responsible for collecting evidence and obtaining statements from witnesses. It can consider information of any nature, including hearsay evidence, newspaper reports or submission made without given evidence. A commission may inform itself of facts in any way it pleases.*"⁵ I see no reason why tribunals such as those of

⁵ Administrator v Transvaal 1989 (4) SA 731

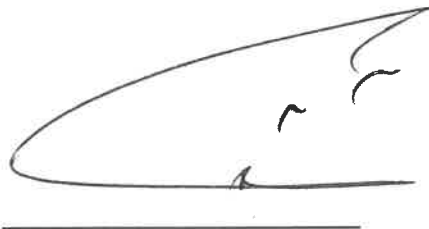
respondents should not enjoy the same procedure as commissions of enquiry for the similar reason that those who preside over such matters are not experts in law.

[35] The attitude by litigants, causing the court to spend unnecessary time and resources on common cause matters deserve censure. In such proceedings, it is to be meted with costs of suit.

[36] In the final analysis, I enter as follows:

36.1 Applicant's application is hereby dismissed;

36.2 Applicant is ordered to pay respondents costs of suit for the entire application, including trial of the matter.



M. DLAMINI J

For the Applicant : **L. Dlamini of Linda Dlamini and Associates**
For the Respondents : **K. Nxumalo of the Attorney General's
Chambers**