IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO.19/2017**

In the matter between:

MASUNDVWINI ROYAL KRAAL **APPELLANT**

and

EVANGELICAL CHURCH **1ST RESPONDENT**

(BY CHRIST AMBASSADORS)

TIMOTHY MYENI **2ND RESPONDENT**

Neutral Citation: *Masundvwini Royal Kraal vs. Evangelical Church (By Christ Ambassadors) and Another (19/2017) [2018] SZSC 10 (4th May 2018)*

Coram: **MCB MAPHALALA, CJ**

DR. B.J. ODOKI, JA

J.P. ANNANDALE, JA

Date heard: **22 MARCH 2018**

Date delivered: **(4 MAY 2018)**

Summary: *Civil Procedure – Application by Appellant for an order ejecting the Respondents from the land situate at Mhlaleni, directing the Respondents to demolish all structures they have constructed on the land and interdicting Respondent's from carrying out any activities on the land – Dispute over the territorial jurisdiction over the area where land is situate – Plea of lis pendens raised by the Respondents - whether matter pending determination by the High Court or the traditional authorities – High Court upholds plea of lis pendens and orders status quo prevailing to be maintained pending determination by appropriate authority – Whether High Court erred in so holding – Whether High Court has jurisdiction to entertain matters relating to land pending before traditional authorities having regard to Section 151 (3) (b) of the Constitution - Held that High Court has no original jurisdiction to entertain matters in which a Swazi Court has jurisdiction, but High Court has only revisional and appellate juridiction as provided by Section 151 (3) of the Constitution - where a matter is pending or has been determined by the traditional authorities, the High Court must refer the matter back to those authorities for determination or enforcement – Decision of High Court upheld, and – Appeal dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] The Appellant, Masundvwini Royal Kraal, brought an urgent Application in the Court *a quo,* seeking the main orders that the Respondents be ejected from the land situated at Mhlaleni, that the Respondents demolish any structures that they have constructed on the land, and that the Respondent be interdicted from proceeding with constructing a church on the land in question.

[2] The background to this case is as follows: *The Respondents approached the Mbikwakhe R all traditional and mandatory requirements. The abovementioned land is situated on Swazi Nation Land.*

[3] When the Respondents undertook a site establishment, the Logoba Royal Council indicated that the land in question belonged to Logoba and therefore Mbikwakhe had no jurisdiction over it.

[4] A dispute ensued between the two Royal Councils as to in whose jurisdiction exactly the disputed property fell. In light of the dispute the Respondents consequently ceased to proceed with construction pending a resolution of the dispute.

[5] The Logoba Council subsequently instituted proceedings under High Court Case No. 733/2013 to interdict the Respondents from proceeding with the construction. Hlophe J. presided over the matter and ordered that the *status quo* prevailing at the time be maintained. He also ordered that the matter be referred to the appropriate traditional authority for determination of the dispute regarding the presence of the Respondents in the area.

[6] As the dispute between the Mbikwakhe and Logoba Royal Council was going on, the Masundvwini Royal Kraal, then joined the fray, contending that neither Mbikwakhe nor Logoba had jurisdiction over the area but it was the one which in fact possessed jurisdiction over the matter.

[7] In view of the apparent dispute, which primarily was in relation to the exercise of jurisdictional authority over the area, the matter was then referred to the Regional Administrator for Manzini to adjudicate over the matter.

[8] The Regional Administrator presided over the dispute, and it was established that in fact the land in question, had in accordance with Swazi Law and Custom been returned to His Majesty for purposes of being re-allocated to the Kwaluseni iNkhundla for development purposes.

[9] In the meeting at the Regional Administrator's office, also present were representatives of the Land Management Board (LMB). The LMB is established in terms of Section 212 of the Constitution and is responsible for the overall management and for the regulation of any right or interest in land whether urban or rural or vesting in the Ingwenyama in Trust for the Swazi Nation.

[10] The Determination by the Regional Administrator was that the land belongs to the Inkhundla and therefore, it is the Inkhundla that may determine how it is to be utilized.

[11] Whilst the matter was still pending the determination (determined by the Regional Administrator and other relevant authorities as per the order of Hlophe J., the Logoba Royal Council launched another Application wherein it was seeking an order that the Respondents be held in contempt of court in that they as Royal Council which exercised territorial jurisdiction over the property in dispute had issued an order which effectively interdicted the Respondents from occupying and constructing on the said piece of land. This application was dismissed on the premise that there was a real dispute of fact in the authenticity of the said letter and whether in fact the Logoba Royal Council does possess territorial jurisdiction over the said piece of land.

[12] Simelane J. who heard the application ordered on 21st March 2014 that the parties be referred to oral evidence on the question of the negotiations undertaken after the interim order of Hlophe J.

[13] On the 9th November 2015, the Appellant launched an urgent Application and on 11th November 2016, obtained an interim order by T. Dlamini J, interdicting the Respondents from constructing any structure on the land forming the subject - matter of the proceedings, pending finalization of the Application, and, the *rule nisi* was issued.

[14] The *rule nisi* was issued on 9th December 2016 and on the 10th February 2017, Maphalala PJ, as he then was, after considering and hearing the arguments upheld the point *in limine* of *lis pendens* and dismissed the Application with costs. The Judge ordered further that the main matter be heard as a matter of urgency.

[15] Being dissatisfied with the judgment of the court *a quo* the Appellant has appealed to this Court on four grounds framed as follows:

"1. That court *a quo* erred in law and in fact by holding that the matter is *lis pendens.*

2. The court *a quo* erred in law and in fact in holding that there is a main matter pending before this Honourable Court yet to be finalised.

3. The court *a quo* erred in law and in fact in holding that other matters pending before court between the parties are related to the finalization of this matter.

4. The court *a quo* erred in law and in fact in holding a point which was never an issue on the papers or in argument"

[16] The main issues raised in the Notice of Appeal are firstly, whether the issue of *lis pendens* was raised before the court *a quo*, and secondly, whether the matter was *lis pendens.*

[17] With regard to the first issue, the Appellant argues that the point in time of *lis pendens* was not raised on the papers or in arguments.

[18] In his judgment the Judge in the court *a quo* observed:

> *" [25] I now come to the third point in limine being lis pendens hence incompetent prayers. It is contended for the Respondents that the issues forming the basis of the Application the Applicant are pending in this court in the main Application hence the prayers in particular prayer 3 and 4 are incompetent as they have the effect of a final order disposing of the matter where the main Application having been heard on similar terms.*
>
> *[26] The Applicants in their Replying affidavit have not replied to this argument which calls for an answer such that this court is obliged to agree with the Respondent's arguments. It would appear to me that the matter is lis pendens in the main matter where the same prayers are being sought. I also find that as a result of this Applicant would not have a clear right in the interdict been sought.*

Therefore, it is without question that this Application ought to be dismissed giving way to the main matter where all the issues between the parties will be addressed."

[19] A careful perusal of the record of proceedings indicates that the founding affidavit of Samuel Nduna Phungwayo, Chairman of Masundvwini Royal Kraal, the Appellant, sworn on the 11th November 2016, contains Annexture LR1 which is the Affidavit of Timothy Myeni leader of the 1st Respondent in which the point *in limine* of *lis pendens* is raised in an application before Simelane J.

[20] In paragraph 3 of the Affidavit, Timothy Myeni deposed:

" 3. It is further submitted that the issues forming the basis of the application by the applicant are pending in court in the main application hence the prayers in particular prayer 3 and 4 are incompetent as they have effect of a final order disposing of the matter without the main application having been heard on similar terms."

[21] This affidavit attached as Annexture "LR1" formed part of the papers before the court *a quo* and, therefore, it is not correct to argue that the issue of *lis pendens* was not raised on the papers before that Court.

[22] The record of proceedings does not seem to include the heads of arguments or oral arguments made at the hearing of the application. However, the Judge in the court *a quo* considered the arguments presented and therefore rightly considered the issue of *lis pendens.*

[23] The next issue is whether the court *a quo* was correct in upholding the point *in limine* of *lis pendens.* This issue raises the question of in which forum the matter was pending. Was it the court *a quo* or in the traditional authorities or in both?

[24] I shall first deal with the issue of whether the matter was pending in the court *a quo.* As already indicated above, the court *a quo* held that the Application ought to be dismissed in order to give way to the resolution "of the main matter where all the issues between parties will be addressed."

[25] It is common cause that the dispute between the parties has a chequered history since 2013, and has attracted several Applications before the court *a quo* as well as in the traditional authorities. The matter was first dealt with in High Court Case No 733/2013 where Hlophe J ordered that the *status quo* prevailing at the time be maintained and that the matter be referred to appropriate traditional authorities for determination of the dispute regarding the presence of the Respondents in the area.

[26] While the matter was still pending before the traditional authorities, the Logoba Royal Council launched another Application in the court *a quo* seeking an order that the Respondents be held in contempt of court as the Royal Council had exercised its jurisdiction over the property in dispute by interdicting the Respondents from occupying and constructing on the said land. Simelane J. who heard the Application on 21st March 2014 referred the matter to oral evidence on the question of negotiations undertaken after the interim order by Hlophe J.

[27] On 9th November 2016 the Appellant launched an urgent application and on 11th November 2015, T. Dlamini J. made an order interdicting the Respondents from constructing any structure on the land pending finalization of the Application. The *rule nisi* was heard by Maphalala PJ, as he then was, who dismissed the Application on the basis of *lis pendens.*

[28] It is clear from the above analysis of the various Applications launched in the court *a quo* that the main Application before the court *a quo* has not been finally disposed of basically on the ground that the main dispute between the parties is pending before the traditional authorities.

[29] It is also clear from the above analysis that the main dispute between the parties was referred to the appropriate traditional authorities not only by the court *a quo* but by the parties themselves. However, it is not common cause between the parties that the matter has been finally determined by the traditional authorities.

[30] The Appellant argues that the main matter was finalized by the local authorities being the Appellant and the Application before court dated 9 November 2016 was seeking to enforce the decision of the Appellant against the Respondents. This argument is supported by the founding affidavit of the Appellant where it is stated in paragraph 5.3 *inter alia*, as follows;

> *"The respondents have not disputed the authority of the Applicant, as they have admitted that the land falls under the authority and administration of the Applicant I refer to an affidavit of 2nd Respondent annexed hereto marked "LR1 paragraphs 2.1 and 5.8. The matter was then brought to the applicant, as the rightful authority to deal with the matter. As it will appear there under the matter was eventually decided by the applicant against the respondents"(sic).*

[31] According to the Appellant, the decision it made was to stop the Respondents from construction on the land in question. The order was contained in Annexture "LR3." The order dated 20 October 2016 directed that no one should construct a building on the land in dispute because there was a school that serves the Logoba Community. This order was however withdrawn by another order made by the Appellant on 17 November 2016 "TM3" which allowed construction of the church to continue undisturbed.

[32] The Appellant also refers to a letter "LR4" from the Attorney General dated 26 November 2013 addressed to the 2nd Respondent advising him to stop all construction until the end of the Incwala.

[33] The Appellant states in its founding affidavit that the main purpose of bringing the Application was to enforce the decision of the traditional authorities. In paragraph 11 it is stated:

> *"Since the Respondents have shown utmost disrespect to the traditional authorities and refused to vacate the place, the applicant has been forced to approach this court for an order to demolish the structures built thereat and remove the fencing that has been built. The conduct of the respondents is such that they have no regard for traditional authorities since they are forcing themselves into a place which was not given to them by the traditional authorities."*

[34] In paragraph 12, of the same affidavit, the Appellant deposes,

> *"This court is enjoined to ensure that the traditional authorities (Masundvwini Royal Kraal) order is enforced as (sic) such appropriate orders should be given against respondents for demolition of the structures. I state that the conduct of the respondents is contemptuous and calls for punishment"*

[35] On the other hand, the Respondents do not agree that the matter has been finally determined . They support the finding of the court *a quo* that the matter is *lis pendens* between the same parties, based in the same cause of action and in respect of the same subject matter. Counsel for the Respondent submitted that the matter is still pending determination by traditional authorities.

[36] Counsel for the Appellant submitted that the matter had been finally decided by the Appellant as the appropriate authority, and there was no appeal or any matter pending before any traditional authority. The Appellant had therefore come to court to enforce its order to stop the Respondents from construction on the land in question.

[37] Whether the issue regarding which of the appropriate traditional authorities has the necessary territorial jurisdiction over the area in question has been resolved or not, remains in dispute between the parties. Similarly, there is no agreement between the parties as to whether the relevant traditional authorities have exercised their jurisdiction and finalized the matter. Consequently, it is apparent that the matter still remains to be finalised by the relevant traditional authorities.

[38] Even if the matter was to have been finalized by the traditional authorities, it is my view that it would not have been necessary or proper to bring an Application before the High Court to enforce the decision of the traditional authorities. It is trite law that the High Court has no original jurisdiction in matters in which a Swazi Court has jurisdiction. Section 151 (3) (b) of the Constitution provides:

"(3) Notwithstanding the provisions of subsection (1) the High Court

(a) . . . . . .

(b) has no original but 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."

[39] Swazi Courts are established under the Swazi Courts Act, No. 50 of 1950 which provides for their constitution, recognition, functions and jurisdiction. The matters adjudicated upon by the Swazi Courts are set out in terms of Section 115 (6) of the Constitution, and include the designation, recognition and removal powers of Chiefs or other traditional authority and Swazi Nation Land.

[40] It is well - settled that under the Constitution there are two separate and distinct systems of law co-existing within the Kingdom, the system based on indigenous laws and customs called Swazi Law and Custom and the super-imposed general law referred to as the Roman Dutch Common Law. Therefore, wherever the question of appropriate forum arises for determination, a proper choice must be made between the Roman Dutch Common Law Courts and the Swazi Courts. ***See Commissioner of Police vs Mkhondvo Aaron Maseko*** *[2011] SZSC 15.*

[41] In ***Phildah Khumalo vs Mashovane Hezekiel Khumalo***, Civil Case No 2023/2007 cited with approval by MCB Maphalala, as he then was, in ***Michael Mvungama Mahlalela and Others*** [2013] SZHC 40, Maphalala PJ, as he then was, stated,

"*[12] It is abundantly clear that the dispute between the parties is over Swazi Nation Land between the people who live and are governed by Swazi Law and Custom. Swazi Law and Custom is the most suitable regime to resolve the dispute and the Chief is a better placed person to handle, same in as much as the Chief is also responsible for allocating land on Swazi Nation Land.*

[16] It is my considered view that this matter can only come before this court on review or on an appeal after running the full course of the hierarchy of the structure provided by Swazi Law and Custom. It is abundantly clear that this country has a dual legal system, that of Roman- Dutch Law and Swazi Law and Custom. These systems co exist with each other and the Roman Dutch system by the High Court can only exercise its powers on review or appeal of a decision in the traditional legal system. In the interest of harmony, it is imperative that respect should be given where it is due."

[42] In ***Maziya Ntombi vs Ndzimandze Thembinkosi*** [2012] SZSC 23, MCB Maphalala JA as he then was, stated;

"Decisions of the Chiefs Inner Councils are legally enforceable equally as those of the Swazi Courts established under the Swazi Courts Act No. 80 of 1950.

Swazi Law and Custom has long recognized the judicial function of Chiefs and their Inner Council in disputes between their subjects which are not justiciable in Courts of general jurisdiction applying Roman Dutch Common Law."

[43] In ***Beauty Jumaima Thomo vs Kenneth Harold Vilakati and Another*** (1159/2006) [2012] SZHC 125 (14 June 2012), Sprey J. observed,

"*[19].....A person affected by the decision of the Inner Council has a right of appeal to the Chief who can either confirm or reverse its decision. Thereafter, decisions of the Chief's Inner Council are appealable to the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. The Act confers both civil and criminal jurisdiction upon Swazi Courts in accordance with Sections 7 and 8 of the Act thereof"*

[44] It is therefore abundantly clear that the appropriate forum for determination of the current matter which is based on allocation and utilization of Swazi Nation Land was the traditional authorities applying Swazi Law and Custom and, not the general Roman Dutch Common Law Courts, including the High Court. It is also trite law that the traditional authorities including Swazi Courts have appellate structures for resolving complaints on appeal against lower authorities.

Thirdly, it is also well established that traditional authorities or Swazi Courts have mechanisms for enforcing their decisions. It is therefore not necessary or proper to approach the High Court for orders to enforce decisions of the traditional authorities.

[45] It is common cause that the High Court has review and appellate jurisdiction in matters in which Swazi Court have jurisdiction. Therefore the Appellant should have exercised its right to apply for review or appeal to the High Court, if it had exhausted all the appellate processes before the traditional authorities.

[46] For the foregoing reasons, I hold that the court *a quo* was justified in dismissing the Application, and therefore, I find no merit in the appeal.

[47] According I make this order:

1. ***The appeal is dismissed.***

2. ***The appellant will pay costs of the Respondents***

DR. B.J ODOKI

JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

J.P. ANNANDALE

JUSTICE OF APPEAL

For the 1st Appellant: **M.S. DLAMINI**

For the Respondents: **N.D. JELE**