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**Ethel Dlamini (Born Gule) v Prince Chief GasawaNgwane (93/2018B) [2019] SZSC 40  
(Judgment 8 October 2019)**

*Simangele D Mavundla*<sup>1</sup>

**Facts**

This was an appeal against the decision of Eswatini High Court where the Court refused to grant the appellant (hereinafter referred to as Mrs Dlamini) an interim interdict against the respondent (hereinafter referred to as Chief Gasa). Dlamini was married to Chief Gasa's brother in 1977, Prince Lomahasha (late) in terms of Siswati customary law. After her marriage to the Prince, Dlamini resided at Qomintaba Umphakatsi (chief's residence and community gathering place) and had five children. Mrs Dlamini's father in law and senior Prince - Chief Tsekwane gave her a field to grow crops. Mrs Dlamini grew crops on the field and enjoyed peaceful and undisturbed possession of the said field up until 2015. The Umphakatsi was fenced, and access was through a gate, which was opened every morning to allow community members to enter.

The senior Prince passed on in 2000, in 2011, Chief Gasa took over the reigns and was later installed as Chief of Lavumisa.<sup>2</sup> He then constructed his homestead across from the old Umphakatsi, which began the new Umphakatsi where community meetings were held. After the completion of the residence, Chief Gasa removed the cattle kraal and the roof of the main hut and then ploughed Dlamini's field without informing or seeking her consent. Mrs Dlamini was the only one left at the old Umphakatsi, and she lived alone after the demise of her husband save for occasional visits by her children and grandchildren. Dlamini began constructing a new pit latrine (toilet) on the old Umphakatsi as the old pit latrine had filled up thus became a health hazard in 2016. However, Chief Gasa without notice to Dlamini, sent men to fill the new toilet. These events made Dlamini feel like Chief Gasa's intention was to drive her out of her homestead.

Chief Gasa's action resulted in Dlamini living in an unsafe and unprotected home that was accessed by domestic animals, which roamed around Dlamini's property freely. She was also vulnerable to intruders. When Dlamini's children commenced fencing Dlamini's residence that

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<sup>2</sup> Eugene Dube 'Emakhosikati report Chief GasawaNgwane to RA' *Times of Swaziland* 27.02.2016 available on <http://www.times.co.sz/news/106873-emakhosikati-report-chief-gasa-wangwane-to-ra.html> accessed 01.04.2020.

would protect her and her property, Chief Gasa forbade her, and he also deprived her of the only field she had to plant crops.

In accordance with Siswati culture, Dlamini lodged a complaint against Chief Gasa with the Regional Administrator of Shiselweni district whose decision was still pending. Meanwhile, Dlamini was living in an unsecured and unhygienic environment. Being satisfied that she had *prima facie* right to the homestead and field, Dlamini approached the Eswatini High Court for an interim order against the said chief:

1. Interdicting Chief Gasa from preventing Mrs Dlamini from installing a fence around the old Umphakatsi of Qomintaba, Lavumisa where she was residing;
2. Interdicting and restraining Chief Gasa from preventing Mrs Dlamini from constructing a new toilet at the old Umphakatsi where she was resident;
3. That Chief Gasa restores the field he dispossessed Mrs Dlamini of and that Chief Gasa re-install the barbed wire fence around the said field.

The High Court dismissed Mrs Dlamini's petition on the ground that the relief sought was final and that to grant such orders would usurp the powers of the Regional Administrator. It was further of the view that Mrs Dlamini had an alternative remedy as an inspection *in loco* had revealed that Chief Gasa intended to construct a joint perimeter fence which was to cover both old and new Umphakatsi; and that there was a pit latrine toilet to be shared by both structures as well as shared fields. Dissatisfied with the court *a quo*'s decision Mrs Dlamini appealed.

### **Holding**

The Supreme Court of Eswatini observed that Mrs Dlamini was an elderly widow living in a rural homestead all by herself and was entitled to protect herself and her property from intruders be it animals or humans. The Court was of the view that Mrs Dlamini's safety and health was at stake and that there was a significant infringement of her dignity. Thus, the court took a progressive approach to rely on human rights to rule that Mrs Dlamini was entitled to the protection of her dignity and being forced to use a communal toilet was a violation of the right to dignity.

The Supreme Court disagreed with the court *a quo* that Mrs Dlamini was seeking an order that was final in nature, therefore in granting the interim order would not amount to the usurpation of traditional structures' powers. The court endorsed Mrs Dlamini's right to protect her undisturbed possession of her homestead and field pending the determination of the rights of the parties by the Regional Administrator and that she did not seek an order for a final determination of her right to the homestead and field. The Court found that in the event of the Regional Administrator finding in favour of Chief Gasa, it would be a simple task to remove the fence and fill up the toilet. In setting aside the High Court's decision, the Supreme Court relied on the right to dignity. Mrs Dlamini's appeal was a success, and the decision of the court *a quo* set aside. Chief Gasa was interdicted from preventing Mrs Dlamini from installing the fence around the old Umphakatsi, from constructing a new toilet, and to restore the field he dispossessed Mrs Dlamini of as well as re-install the barbed wire fence around the field.

### Significance

It is a norm in Eswatini for a woman to move to her husband's parental home upon marriage – it is a patriarchal society, after all.<sup>3</sup> This is in terms of customary law and tradition, which regulate every aspect of women's lives in rural communities.<sup>4</sup> Eswatini is a patriarchal society. Patriarchy is used to justify men's superiority to women, as such men are viewed as the head of the family and the household, with the power to make all decisions and control all assets and property.<sup>5</sup> In Eswatini primogeniture entails that a male descendant inherits and succeeds to the estate of an ancestor (usually a father).<sup>6</sup> This practice excludes females related to the ancestor whether they are older siblings or are married to the ancestor. Through the principle of primogeniture, the subservient social position of women is cemented in rural communities where it is estimated that about 70 per cent of women live in rural areas.<sup>7</sup> Female siblings are barred from inheriting from their fathers based on their gender and married women though they migrate to the husband's home are considered outsiders in their matrimonial homes so as to deprive them of the inheritance that is due to them once their spouses pass on.<sup>8</sup>

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<sup>3</sup> M Aphane et al "Multiple Jeopardy: Domestic violence and women's search for justice in Swaziland" (2001) 71.

<sup>4</sup> Ibid 33.

<sup>5</sup> T Nhlapo, Marriage and divorce in Swazi law and custom, (1992) 75. Nhlapo surmises that when the head of a household (husband) dies, the family council (*lusendvo*) meet to choose an heir to the estate.

<sup>6</sup> M Aphane et al "Multiple Jeopardy: Domestic violence and women's search for justice in Swaziland" (2001) 33.

<sup>7</sup> Central Statistical Office, Population and housing census 2007.

<sup>8</sup> Women and Law Swaziland, Domestic violence 2001.

To further help elucidate this practice is the case of *Zodwa Kunene and WLSA-Swaziland v Chief Prince Jabhane and others, Minister of Constitutional Affairs & Attorney General* Case No, 1592/17. However, this case was later withdrawn from the court's roll. The facts were to the effect that Kunene's parents passed away together with her five siblings.<sup>9</sup> She was living in her parental home with her children. One of the male siblings of Kunene was survived by a male child, Kunene's nephew, and they were staying in Kunene's late parents' home. Kunene stated in her court papers that the Chief's Council informed her that her parents' home belonged to her nephew, he was the heir and must vacate the homestead with immediate effect. She had nowhere to go. She went to court challenging the customary practice of male primogeniture's consistency with the Constitution of Eswatini, in light of the right to dignity,<sup>10</sup> equality and freedoms,<sup>11</sup> and rights of women amongst others.<sup>12</sup> Even though there is no decision on this issue, many women have had a similar experience. In a 2001 study, it was reported that stories about how the in-laws family will soon after the death of their son, come to the house of the widow, demand all household goods, and evict the widow are too common.<sup>13</sup>

The significance of the case of Ethel Dlamini is found in the Supreme Court's progressive interpretation of the chain of events that were being inflicted to Mrs Dlamini as a violation of her dignity. The court could have looked into the requirements of an interdict to see if Mrs Dlamini's case was in line with them or not. These are whether the applicant has a *prima facie* right; apprehension of irreparable injury, and that there is no other satisfactory remedy. Instead, the Court observed that Mrs Dlamini was deprived arbitrarily of the field given to her by her father-in-law and that she was being forced to live in unsanitary and degrading conditions while the decision of the Regional Administrator was pending. It then ruled that her right to dignity was being violated. The decision of *The Government of Swaziland v Aaron Ngomane*,<sup>14</sup> which defines human dignity, was adopted in this case and it is as follows:

It is universally recognised that human dignity is directly the dignity of each human being as a human being. This encapsulates the viewpoint that human dignity includes

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<sup>99</sup> See <http://www.southernafricalitigationcentre.org/2019/04/25/swaziland-a-challenge-to-customary-principle-of-male-primogeniture/>

<sup>10</sup> Section 18.

<sup>11</sup> Section 20.

<sup>12</sup> Section 28.

<sup>13</sup> Women and Law Swaziland Domestic violence 2001.

<sup>14</sup> *The Government of Swaziland v Aaron Ngomane* Civil Appeal Case No. 25/2013.

the equality of human beings. Discrimination infringes on a person's dignity. Human dignity is a person's freedom of will. Human dignity is infringed if a person's life or physical or mental welfare is harmed. It is infringed when a person lives or is subjected to humiliating conditions which negate his humanity. It envisages a society predicated on the desire to protect the human dignity of each of its members.

Former USA President Barack Obama once said: “[y]ou can judge a nation, and how successful it will be, based on how it treats its women and its girls.”<sup>15</sup> It is clear from the Ethel Dlamini's case that the Supreme Court progressively interpreted the provisions of the Constitution on human rights to arrive at a decision that halted the respondent from violating Mrs Dlamini's rights.

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<sup>15</sup> <https://twitter.com/barackobama/status/426379154896871425?lang=en> 23 Jan 2014 accessed 26.01.2020.