



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 174/2020

In the matter between:

BHEKIZWE BIYELA

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Nkandla Magistrates Court (TJ Kasambara, sitting as court of first instance):

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence by the trial court are confirmed except that it is added to the sentence:

‘ It is ordered in terms of section 103(2) of the Firearms Control Act 60 of 2000 that the accused is not declared unfit to possess a firearm.’

JUDGMENT

Delivered on:

Mngadi J : (Nkosi J – Concurring)

[1] The appellant appeals with leave of the trial court against both conviction and sentence. The appellant was charged before the magistrate’s court with one charge. The charge the appellant faced was a charge of malicious injury to property. The charge alleged that on or about March 2017 and at or near Ndweni area in the district of Nkandla the accused did unlawfully and intentionally break and damage/destroy poles the property or in the lawful possession of Musa Mpungose (the complainant) by extracting poles that had been installed with intent to injure the complainant in his property.

[2] The appellant who was legally represented when the charge was put to him pleaded not guilty. The appellant’s legal representative after confirming that the plea of not guilty was in accordance with his instruction placed it on record and it was confirmed by the appellant that they elected not to make a statement disclosing the basis of defence. The learned magistrate after hearing the evidence convicted the appellant as charged. He sentenced the appellant to pay a fine of one thousand five hundred (R1 500) in default to undergo three (3) months imprisonment wholly suspended for a period of three(3) years on condition that he is not convicted of malicious injury to property committed during the period of suspension.

[3] The State to prove the case against the appellant adduced evidence of four (4) witnesses, namely; Thokozile Mpungose (the mother of the complainant); Musa Erick Mpungose (the complainant); Mzuzwane Amos Mpungose (the complainant's father) and constable Prince Scelo Nxumalo. The appellant testified for the defence and he did not call any other witnesses.

[4] Thokozile Mpungose testified that she was the complainant's mother. She was born in 1941. She resided at Ndweni ward in the area of Emahlanzeni at Nkandla. In March 2017 the induna of the ward Mkhize came to her residence. Mkhize told her that he had been sent by the appellant to deliver the complainant's poles. The appellant was an Inkosi of the area. Mkhize said that the appellant told him to tell her that the poles had been cut and are delivered at no cost to the traditional council by the complainant. Mkhize further told her that he was with the appellant there at her residence she may go out to greet the appellant. She went outside and the appellant was in his vehicle parked next to the gate. Persons were off loading poles from the appellant's vehicle and taking them into her yard. She greeted the appellant and the appellant told her to tell the complainant that he brought the poles and he cut them and he was not going to charge him anything. They finished offloading the poles and the appellant left.

[5] She testified that the complainant worked at Empangeni. The poles were not dug from the ground but were cut above the ground. The poles belonged to the complainant. The complainant installed the poles to fence a portion of land. The portion of land in question belonged to the Mpungose family. Previous Inkosi allotted the portion of land to the Mpungose family. The portion of land was allotted to the Mpungose family prior to her marrying into the family. After she married to the family, the family continued ploughing the portion of land and using it also for grazing. It is not a huge portion of land. The Mpungose family allotted a site in the portion of land, one to the Mdunge family who were their in-laws in that a daughter of the Mpungose family was married to the Mdunge family. Another site they allotted to Mthabela family who are the cousins of the Mpungose family.

[6] She testified that she planted vegetables in the piece of the portion of land. Her husband was now too old to work the portion of land. He has permitted the complainant to plough the portion of land. Her husband oversees the working of the portion of land by the complainant. She testified that if a person needs to be allotted a portion, that person would approach the owner, the owner if agreeable would demarcate the portion after informing the induna, the induna would then report the allotment to the new person to the Inkosi and his Traditional Council. However, a father can permit his son to plough a portion of land allotted to the family without reporting to the induna or Inkosi.

[7] She testified that once allotted a portion of land for ploughing, if not used for some time you do not have to ask permission from the induna or Traditional Council to commence using it. Her husband did not report to the induna or the Traditional Council that he permitted the complainant to use the site such an arrangement is not formal or permanent and it is not reported to the induna or Traditional Council. The portion of land although ploughed by the complainant remains her husband's allotment. The complainant worked at Vryheid and stayed at Empangeni. She stated that the complainant had a right to fence the portion of land to keep livestock away. The portion of land passed from Daniel her husband's father to her husband. When it was put to her that the complainant started to plough the portion of land in 2015, she said she did not know when he started ploughing the portion of land. She did not know that the induna said to the complainant he must not to plough the portion of land. The complainant told her that the appellant instructed him not to put up the fence on the portion of land and he was told to remove the poles. The complainant did not remove the poles because he believed that they were rightfully installed. In March 2016, there was a meeting, Mkhize and the appellant came to see the portion of land where the fence was being put up. They met with her husband and family members including the complainant. In the meeting, the appellant was told by Aunt Matrina Mdunge that the portion of land belonged to the Mpungose family and that it was wrong to order that the poles be removed. She testified the poles were where the fence would be did not interfere with the cattle track. Mrs Mdunge said the poles next to her homestead should not be removed. She testified that the appellant could not say that he did not know the complainant her son, the appellant

granted permission for the complainant's marriage ceremony to be held. The complainant is renting a place at Empangeni.

[8] Musa Erick Mpungose, the complainant testified as follows. He was forty eight (48) years old. He resided at Ndweni ward. He received a report from his mother regarding the poles that were brought to his home by the appellant. The poles were damaged in that they had been cut above the ground. He got twelve (12) poles from the forest and seven(7) poles he bought from a hardware. They were all cut. He had installed them by using concrete. He paid R500 for the poles and he bought three (3) bags of cement. The cut poles are too short to be used as he had used them.

[9] He testified that the poles were used to put up a fence to fence a portion of land belonging to the Mpungose family. They used the portion of land to plough on it and for grazing. It belonged to the Mpungose homestead. He was the fourth generation of the family. His father and his brothers agreed with him to fence the portion of land as it was fenced before. He then put up the fence. The neighbours knew that he was fencing the portion of land belonging to his family. Their neighbours are the Mdunges and Mthabelas. His grandfather allotted sites to the two families. The appellant had a homestead not very far from his home. The appellant knew that the portion of land in question belonged to the Mpungose family. He knows that his father is the third generation in the family. His father and the appellant were in the same school. The induna Mkhize might not know that the portion of land belonged to his family because he is knew in the area, but all the other people know that the portion of land belongs to his family.

[10] He testified that he and the appellant talked about the removal of the poles. They could not reach an agreement. He then received a letter from the appellant. The letter stated that the appellant would remove the poles, if he is not satisfied he must take the matter to court. He then referred the matter to provincial department of Co-operative Governance and Traditional Affairs (COGTA). COGTA had a discussion with the appellant and he got surprised when his poles were removed. He testified that the portion of land he was fencing belonged to the Mpungose family and it is wrong to say that he

had no permission to use the land. The portion of land belonged to the Mpungose clan. His father had two wives. There two sons in the area and his father's siblings had other sons. His family's homestead is built in the portion of land in question.

[11] The complainant under cross-examination testified as follows. He had a Master's Degree in Public Administration. He was an Assistant Director in Quality Management Systems. He is a public administrator. He would not dispute that the appellant became an Inkosi in 1978, that between 1974 and 1978 he was a clerk in the Nkandla magistrate's court, that between 1994 and 2009 he was a member of Parliament in the National Government in Cape Town, that between 1980 and 1994 he was a member of Parliament of the erstwhile KwaZulu government and in 1987 to 1994 he was Deputy Minister of Economic Affairs for the KwaZulu government.

[12] It was put to the complainant that the appellant was a man of substance, has held several high positions in society and he is meticulous and kept a list of members for each homestead in his area. The letter written by the appellant to the complainant dated 6 March 2017 was put to the complainant and it stated, inter alia, 'The homestead that I know of belongs to your father....What surprises me is you are not even in the list of your father's homestead that is at Emahlanzeni area....the question that I am asking myself is that the members of you family have forgotten you because you have stood by yourself to be the member of the area....Your failure to remove the poles from where you had installed them and ploughing the fields without permission. The induna of Ndweni told me that you did not remove the poles which I have told you to remove, and he told me that you are continuing planting the plants without permission. You never had a homestead at Emahlanzeni area and you never had a field to plant your plants.. The homestead that I know of belongs to your father Mzikayise Amos Mpungose. He is the one I know that has the planting fields that are no longer in use. I do not remember him coming with you to me to say that you are the one that is going to take that place. To take the homestead and the fields. Your father is still alive. I know that he respects the chief as well. You are doing what is called disrespect whilst holding a position of being a circuit manager in the Department of Education in the Government of KwaZulu-Natal. I believe that you grew up in that place of Emahlanzeni before living at Esikhaleni at Empangeni. I believe you know the difference that you should buy land but from rural areas, you have to please which is the one that you cannot

do... So that you should not be in problems, you should not do what you are doing. This is the only lesson I can give. If you believe that I have destroying one of your rights, you should do what is right and go to court so that you can find help. As you have said that you won't be able to remove the poles, they are foundation, we still help you remove them without paying.. From the plaas you won't do any plants there. If you have planted we will take it, we will remove it.' The complainant stated it surprised him that he was not in the list of the members of his father's homestead. He confirmed that the letter advised him to take the matter to court and therefore he did not approach the appellant again after receipt of the letter.

[13] It was put to the complainant that the argument at the end will be that he no longer had his homestead at Emahlanzeni, therefore, he had planted on a portion of land belonging to the Mpungose homestead. He admitted there is a time when the portion of land in question was not ploughed due to lack of means and part of it allotted to other family members including the Mdunge family and the Mthabela family. A Khanyile family too was allotted a site. He stated that if there was a request for a site whether by a family member or not, the family would meet and decide whether to grant the request or not. He denied that anybody who wants to be given a piece of land at Emahlanzeni area must come and khonza to be allotted land by the Traditional Council and that he was bound to do the same. He said he never asked for any land, he used land of his homestead. He agreed that in the meeting the Mdunge and Mthabela families attended. They knew their portions of land and they were not affected by the fence he was putting up. He denied that land not used for a long time reverts to the Traditional Council and that it can then be reallocated following the khonza procedure. When it was put to him that he was fencing land in a ward falling under induna Mkhize, and induna Ntuli's ward, he said he was fencing a portion of land belonging to the Mpungose family and induna Ntuli knew that the portion of land he was fencing belonged to the Mpungose family.

[14] The complainant admitted that after they had postponed meeting twice, they met with the appellant on the issue of the portion of land in question and the installation of poles. The appellant, induna Mkhize, his father, himself, the Mthabelas and the Mdunges attended the meeting. He admitted that in the meeting the appellant explained that the

complainant had no permission to install the poles he had installed. He stated that he explained and it was acknowledged that he would not be fencing in the neighbours and that the fence would not interfere with the cattle track. He said they could not reach the agreement that the poles installed would be removed and there was no agreed deadline for their removal. When it was put to him that he was told that it was properly wrong to plough the open land without permission, he said it was not open land but it was a plot belonging to his family. When it was put to him that the appellant explained that he had to follow the khonza procedure to get permission to fence and plough the plot, he said he did not want to be allotted a piece of land he was using a portion of land belonging to his family. He said the appellant knew that it was a portion of land belonging to his family. He said the meeting did not end well. The appellant accused him of being strong headed. After the meeting, he approached the appellant and told him that he did not want to cause trouble, he wanted to use the portion of land for farming something he was fond of and the appellant could see that crops had been planted. He reiterated to the appellant that the portion of land belonged to his family. The appellant said the must discuss the matter with induna Mkhize. He stated that in the meeting the appellant said they did not have any land. His father and the Mpungose family members in the meeting told the appellant that the portion of land in question belonged to the Mpungose family. He said he did not have his homestead in the area he lived in the homestead of his father, which was the homestead of his grandfather. It was put to him that according to the appellant and the Traditional Council the only person who has an allocation of land, the person who can use the land is his father, he said he was using the portion of land with his father and with his father's permission. He denied that in the meeting he said he had difficulty in removing the poles because they were installed with concrete. The appellant, it was put, because poles had not been removed and the deadline had come and gone, reported to the Traditional Council and council said they must be removed.

[15] Mzuzwana Amos Mpungose testified as follows. He was 76 years. He was the father of the complainant. The poles that were cut and removed belonged to the complainant. The complainant used the poles to put up a fence on a portion of land that belonged to his family. The complainant was ploughing and planting in the portion of land

since he did not have the financial means to do so. An Inkosi at the time allotted the portion of land in question to the Mpungose family. It was allotted to his great grandfather and remained in the family. It passed to his grandfather, to his father and to him. They have up to now continuing residing in the same area.

[16] He testified that he used to work at Isipingo for 15 years. He stayed at Makhutha to be near his work place. He once a year came to his homestead at Ndweni in Nkandla. He is now retired. When the fence on the portion of land was put up by the complainant, there were discussions but he did not participate in them because he felt he was too old. His homestead consists of five houses. There is a fence near the houses of the homestead. The portion of land in question extends from his homestead. The portion of land was fenced to keep livestock away from the planted crops. The portion of land was ploughed annually but recently due to poor rains, it was not ploughed. It is not in a condition as land that has never been ploughed. The Mdunge family is about 50 metres from his homestead. His father allotted a site to the Mdunge family. The Mdunge family did not have a problem with the putting up of the fence by the complainant. His father too allotted a site to the Mthabela family. The fence would keep livestock away but would not restrict access of the Mdunge and Mathabela families to their properties. He was not aware that if you have not ploughed land allotted to you, you had to inform the Inkosi when you resume use of the land.

[17] He testified that he was present when the appellant called a meeting for the complainant. They told the appellant that the place he was saying is Nqubeni was not Nqubeni because he knew the boundary of the portion of land in question. The appellant said they should remove the fencing poles, which was due to a misunderstanding on his part. They told him that the portion of land in question belonged to the Mpungose family. The appellant said the complainant had no right to the portion of land because he did not know that the complainant was his son. He stated it surprised him that it was said the complainant could not put up the fence without having khonzaed for the portion of land. The complainant was his son and he gave him permission to put up the fence to keep away livestock from a portion of land belonging to the Mpungose family. There was no

need to remove the poles they had wronged no one. When it was said the appellant would say because the land had not been used for a while and it reverted to the Inkosi, he said they were never informed of such and it was the first time he hears of it. The fence they were putting up would have a gate, it would not close cattle track.

[18] Prince Scelo Nxumalo testified as follows. He testified that he was a constable in the Local Criminal Record Centre at Nquthu. He took photographs of the poles in question and compiled a photo album. The photos depict the poles where they were cut. One photo shows the area where the poles were before being cut by a saw, which indicates the area to run from the homestead. Other photos show part of the pole with a metal plate.

[19] After the State closed its case, the appellant applied for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 on the basis that there was no evidence that the appellant damaged the poles himself and that he had the intent to injure the complainant in his property. The learned magistrate dismissed the application for a discharge.

[20] The appellant testified as follows. He was an Inkosi of Emahlanzeni area in the district of Nkandla. He was born on 4 April 1948. He became an Inkosi on 28 October 1978. Before he was installed as an Inkosi he worked at various places. He was before he became an Inkosi a clerk at Nkandla magistrate's court. After he became an Inkosi he held various positions as stated earlier. It was not true that he committed the crime, which is the subject of the charge. Mkhize the induna informed him that the complainant has gone and installed fencing poles in an area, which has not been given to him. He said he talked to the complainant to no avail. Mkhize was induna of Ndweni a ward in the area of Emahlanzeni. The parents of the complainant had their homestead at Ndweni. Mkhize said the complainant has installed poles from his father's homestead all the way up to another ward at Nqabeni. Nqabeni is a different ward under induna Ntuli. Mkhize said the complainant said he was fencing an area that belonged to the Mpungose family.

[21] The appellant testified that the portion of land in question belonged to the nation since it stayed for while unused. It was unused from the time he was installed an Inkosi. There are people allotted plots by an Inkosi in the area and some of them have moved away. He informed Mkhize to advise the complainant to go with him to the place where he had installed the poles. He eventually had a meeting with the complainant on 23 March 2016. They met at the place where the poles had been installed. It was the complainant, his parents, his aunt, a woman from Mthabela family and the induna. The complainant said he was trying to put up a fence to assist his neighbours to keep away the livestock. He told the complainant that it was not permitted to fence in other persons. He told the complainant to remove the poles. He also told him that he did not have permission to utilise the land and he should not continue ploughing in that area. When they were leaving, the complainant came to him and he said his intention was not to fight, he was apologising. He said it would be difficult to remove the poles because they were installed with concrete and he worked far way. The complainant's uncle said he would assist the complainant to remove the poles. The induna called the complainant's father to hear what the complainant had said. The appellant told the complainant to call a formal meeting of neighbours affected by the erection of the fence in the presence of induna and to report to him the decision taken in that meeting. He told the complainant that if he needed land for farming he could form a cooperative with women and young people and approach the appellant with a request to be allotted land for farming. He stated that the appellant was given a deadline until end of May to remove the poles.

[22] The appellant testified that in May the poles were not removed. He reported to the Traditional Council that the poles had not been removed. The Traditional Council took a decision that the complainant should be assisted to remove the poles by having the poles cut and delivered to his parental home. He wrote to the appellant the letter dated 6 March 2017, which was earlier read into the record. The complainant did not respond to the letter. They then arranged for people and got the machine to be used. He took the boys and the machine and left them with the induna. He told the induna that when they are finished they must let him know. He made all the arrangements as an Inkosi and chairperson of the Traditional Council. Later, the induna phoned him that they are done.

He went to them with his vehicle. They loaded the poles on his vehicle. He took the poles to the parental home of the complainant with the boys and the induna. The poles were off-loaded and put inside the yard. He told the complainant's mother after greeting her that they came to deliver the complainant's poles. He told her that they removed the poles and they were not going to pay anything to the Traditional Council for the removal and the delivery of the poles. He said he had no intention to injure the complainant by damaging his property. He stated that he was very patient with the complainant.

[23] The appellant testified that the complainant's name was not in the register of the people living in the area. He had no issue with the complainant but the complainant is a person not keen to follow the rules, he wants to do as he pleases. He stated that the complainant does not want order that has been in the area of Emahlanzeni since he installation as an Inkosi. The complainant's father stayed at KwaMakhutha. He and the complainant did not attend community meetings and they would not know what was discussed because such issues are discussed in community meetings or imbizos. He said a long time ago there was so much land because there were fewer people and people were given huge amounts of land which included on which to build, for ploughing and for grazing. However, now there are many people and it cannot be afforded to have land that is not used. He stated that at Emahlanzeni everyone is given land to build his own home.

[24] He testified that if a person had not been using the land allotted to him for a while and he wishes to start using the land he must go to the induna and the induna would take him to the Inkosi who will then reallocate the land. COGTA advised that the complainant made a complaint about a portion of land belonging to his family taken away. He asked to be furnished with a copy of the complaint, which was not done. One official from COGTA Cetshwayo office came to him. He showed that person the portion of land in question. He was later told that he had done nothing wrong but the official will come to deliver a report to all the interested persons but that has not happened.

[25] Under cross-examination, the appellant testified that he was the chairperson of the Traditional Council. He was present when it was resolved that the complainant must be assisted by having the poles removed. He wrote the letter dated 6 March 2017 to the complainant. He arranged for the removal of the poles including securing the machine that was used to cut the poles. He said it was true that the portion of land in question used to belong to the Mpungose family. Since he was installed Inkosi, the portion of land was never ploughed. The poles after were cut were shorter because a piece of the pole remained in the ground. He was not sure when the portion of land was allotted to the Mpungose family. He stated that they have never gone to the Mpungose family to inform them that the portion of land in question no longer belonged to them. It was announced in the meetings that if you do not use the land allotted to you it would revert to the Inkosi. The induna told them when they started digging for the poles that the portion of land no longer belonged to them, they had to go and ask permission from Inkosi to use the land. He did not dispute that the complainant still resided in his father's homestead. The appellant when asked why the complainant has to pay khonza fee if he wants to use the portion of land belonging to his father, he said it depends on what the person is there to konza for, if they are there so that they want to farm then they do not pay a khonza fee but if they want to build a home then there is money to be paid so that the Traditional Council would have some money.

[26] The appellant testified that the portion of land does not belong to the complainant's father but it belongs to the nation and it was just given or the father was given permission to use that portion of land, and if he does not use it, it then reverts to the nation. When it was put to the appellant that according to the complainant the piece of land belonged to the Mpungose family, he said yes that is what he knew, he last knew, but he was told that it is not so anymore so if he wants the land he has to ask for it from Inkosi. Asked why they did not resort to a legal remedy when the complainant did not remove the poles, he said they had to assist in any way they can whether the person being assisted wanted to be assisted or not. Asked whether to damage the complainant's poles was assisting the complainant, he said the poles were not damaged. He said he wanted to use the portion of land in question for a co-operative and the Mpungose family had no say on that. Asked

how long did it take for a portion of land to remain unused before it reverts to the nation, he said it takes five (5) years or more.

[27] The appellant's legal representative argued that there was no evidence that the appellant cut the poles, that the cutting of the poles constituted damaging the poles, that the appellant had an intention to injure the complainant in his property or that the portion of land on which the poles were installed the complainant had rights to it. Lastly, that the complainant gave consent for the removal of the poles and since the poles were installed with concrete it was reasonable to remove them by cutting them above ground.

[28] The learned magistrate stated that he did not intend to deal with the question of land and who had the authority to do what on that land. He stated that the issue before him was whether the complainant's poles were damaged and if so by whom and whether that was done intentionally and unlawfully. He found that the decision to cut the poles constituted intentionally damaging the poles.

[29] On appeal, it is argued that the appellant was lawfully performing his functions as Inkosi a traditional leader. If the appellant exceeded the bounds of his authority, it is argued, it is a *bona fide* assertion of a right, which negates malice. Further, it argued that the portion of land in question fell within the area under the jurisdiction of the appellant. The appellant and the Traditional Council, therefore, were entitled to take action to remove poles installed on land the complainant had no rights. Lastly, it was argued, the decision to remove the poles was made with the consent of the complainant and the complainant did not challenge it.

[30] The fact whether an accused had the requisite intention, as stated by the magistrate, is a factual deduction, which must be proved beyond reasonable doubt by the State. The appellant maintained that he told the complainant that he had no right to fence and to plough in the portion of land. He told the complainant to remove the poles and if had planted plants to remove those plants. He added that if the complainant failed to do as ordered, he and the Traditional Council should do so. The letter written by the

appellant dated 6 March 2017 confirms as much. Therefore, in my view, there is no substance in the contention that the complainant gave consent to the removal of the poles. It was a decision of the appellant and the Traditional Council, the appellant was the chairperson of the council.

[31] The question is whether the poles were unlawfully installed which would entitle the appellant as authority in charge to remove them. If the appellant was entitled to remove them, the manner in which they were installed made it reasonable to cut them above the ground. It is common cause that the portion of land in question formed part of land under the Ingonyama Trust constituted in terms of the KwaZulu-Natal Ingonyama Trust Act No. 3 KZ of 1994 (the Trust Act), that the appellant is an Inkosi as defined in the KwaZulu-Natal Traditional Leadership and Governance Act No. 5 of 2005 (the Act), that the appellant exercised jurisdiction over Emahlanzeni Community, which is a traditional community, recognised in terms of the Act, that Ndweni ward falls within the area of Emahlanzeni. In terms of section 2(4) of the Trust Act the land is dealt with in accordance with Zulu indigenous law or any applicable law. Under Traditional Law and Customs the land occupied by a particular tribe is administered and held in trust by the Inkosi and his or her izinduna for the benefit of the members of the tribe or community concerned. Each family head has a right to be allotted a family home site, arable land and the right to graze his livestock on the pasture-lands. The land is allotted to an individual without requiring any return in the nature of a purchase price. Individuals holding of a portion of the land is inviolable and inheritable. The process of processing the request to be allotted a portion of land is called 'khonza' and it may be accompanied by a fee to cover the administrative expenses of the traditional council called 'khonza fee'. See *Ingonyama Trust v Radebe and others* [2012] 2 All SA 212 KZP par 40; 2012 JDR 0050 (KZP)

[32] The appellant raised a number of grounds, which made it unlawful for the complainant to install the poles and necessitated their removal. He said the poles would result in a fence fencing in the neighbours restricting their access to their homesteads and that fence would block cattle track. He did not call any neighbour as a witness or owner of cattle. There was also no evidence that any neighbour or owner of cattle

complained to the appellant or to Mkhize the induna. The complainant's evidence was that there was no objection from the neighbours and the cattle had the track that they used all along. Further, the appellant stated the complainant was fencing an area going over to the area of another induna, which would cause a conflict and war. The complainant's evidence was that he was fencing the portion of land that belonged to his family and he was fencing it where it was fenced before. He stated that induna Ntuli of the other ward knew the extent and boundary of the portion of land belonging to his family. It appears to me these reasons put forward by the appellant were to cover his real reason to have the poles removed.

[33] The real reason the appellant objected to the complainant putting up the fence to fence the portion of land in question is that the complainant had not sought permission from him and the Traditional Council to use the portion of land. This is what the appellant said Mkhize told the appellant the complainant was doing. It is what Mkhize, on instructions from the appellant, told the complainant that he could not do. In the meeting, the appellant explained that the complainant did not have a right to plough on the portion of land he was fencing. In the letter, dated 6 March 2017 the appellant reiterated that the complainant did not have the right nor permission to use the portion of land that he was fencing.

[34] The reason initially given by the appellant that the complainant did not have a right to use the portion of land in question is stated in the letter dated 6 March 2017. The reason was also put to the State witnesses. The reason was that the complainant did not have a homestead in the Emahlanzeni area and he did not appear in the register of the residents of the homestead of his father. The letter points out that the portion of land in question belongs to the complainant's father. It says that the complainant's father did not come to the appellant and tell him that he was giving the portion of land in question to the complainant. It was stated that the complainant needed to approach the induna with a request to be given a portion of land and the induna would convey the request to the appellant.

[35] When the complainant and his parents in their evidence made it clear that the complainant was fencing a family plot to plough with concurrence of the family, then the appellant started claiming that the portion of land had reverted to the nation. He conceded that the complainant's family, before the complainant started to fence the plot, were never informed that they had lost their rights to the plot. If the plot had not been used from 1978 when the appellant was installed an Inkosi, it is inexplicable that the appellant would only claim the plot as belonging to the nation in 2016. If the complainant's family lost their rights to the plot after five (5) years of unused, why is the appellant acknowledging that the complainant knew in 2016 the plot as belonging to his family? It is also not explained why the appellant would initially say the plot belonged to the complainant's father if it belonged to the nation. How can a person lose rights he has to a plot by it being announced in a meeting that people who have plots allotted to them are liable to lose their rights to the plot if they do not use them. Further, there is no process that is initiated to take away the rights of a person to the plot and it is not communicated to the affected person that he has lost his rights to the plot. In my view, there is no evidence that the complainant's family lost or had lost their rights to the portion of land in question.

[36] It is argued on appeal for the first time that the appellant mistakenly honestly believed that he was lawfully exercising his authority. This defence was not raised before the magistrate. The appellant did not testify and lay basis for the claimed defence. The raised defence acknowledges that the plot belonged to the complainant's family and the appellant was not entitled to stop the complainant from fencing and using the plot but the appellant mistakenly thought he was entitled to stop the complainant from using the plot. It is strange that the appellant and the Traditional Council would not know procedures and processes to be followed to terminate people's rights to plots allotted to them. If the appellant knew the correct factual situation and it is only that he attached incorrect legal consequences, it would appear that he acted under ignorance of the law. The appellant was presented as a learned experienced Inkosi. In rural areas issues of land are sensitive issues and an Inkosi deals with such matter all the time. The loss of rights to an allotted portion of land is a serious matter. The induna Mkhize told the appellant that the complainant was fencing the plot in order to recommence ploughing as it belonged to his

family. The appellant knew the area well and the history relating to it. He knew that the plot had never been taken away from the complainant's family. Nevertheless, he tried to use his authority to force the complainant's family off the plot. In the trial, the appellant raised a number of grounds either to avoid responsibility for cutting and removal of the poles or to justify his claim that the complainant did not have a right to fence and plough the plot. He arrogantly embarked in forcing the complainant and his family out of a plot lawfully allotted to them. Arrogance is not ignorance.

[37] It is trite that the onus is on the State to prove beyond reasonable doubt all the elements of the crime. However, in *S v Mlambo* 1957 (4) SA 727 (A) at 738A-C it was held that there is no obligation upon the Crown to close every avenue of escape, and the accused's claim to the benefit of doubt must not be derived from speculation, but must rest upon reasonable and solid foundation created either by positive evidence or evidence gathered from reasonable inferences which are not in conflict or outweighed by proved facts. In *S v Kubeka* 1982 (1) SA 534 (W) at 537F-G where it was held that the test whether there is reasonable doubt as to the accused's guilt is not whether the Court subjectively disbelieved him, the Court need not even reject the State's case in order to acquit him. The Court is bound to acquit him if there exists a reasonable possibility that his evidence may be true. In *S v Mnyandu* 1973(4) SA 603 (A) it was held that malicious injury to property is the wrongful and intentional damaging of a thing belonging to another person. The requisite intent is a subjective one either in the form *dolus directus* or *dolus indirectus* or *dolus eventualis*. *Dolus eventualis* entails the existence of actual awareness by the accused of the dangers, which might result from his conduct and he reconciling himself with that eventuality. In my view, on the totality of the evidence there are no basis for the belated claim of the appellant of having acted under a *bona fide* claim of right.

[38] There were no submissions in the heads of argument relating to sentence and likewise oral arguments were confined in challenging the conviction. There is no indication that the sentence imposed is disturbingly inappropriate or is vitiated by a material misdirection or that it is so severe that it induces as a sense of shock. In my view, the sentence imposed by the learned magistrate is an appropriate sentence.

However, in terms of section 103(1) of the Firearms Control Act 60 of 2000, the magistrate ought to have ordered that the appellant is not declared unfit to possess a licence to possess a firearm.

[39] In the result, I propose the following order:

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence by the trial court are confirmed except that it is added to the sentence:

' It is ordered in terms of section 103(2) of the Firearms Control Act 60 of 2000 that the accused is not declared unfit to possess a firearm.'



.....
MNGADI, J

I agree,



.....
NKOSI, J

TOPPING AJ (dissenting)

[40] The appellant was charged in the Magistrates' Court for the District of Nkandla on one count of malicious injury to property. It is alleged in the charge sheet that, in March 2017, and at or near Ndweni, in the district of Nkandla, the appellant unlawfully and intentionally damaged certain poles, such being the property or in the lawful possession of one Musa Mpongose ("the complainant"), by extracting them from where they had been installed with the intent to injure the complainant in his property.

[41] The appellant pleaded not guilty to the charge and opted not to make a statement setting out the basis of his defence. The appellant was subsequently found guilty by the learned magistrate and was sentenced to pay a fine of R 1 500, in default of undergoing three months imprisonment, which was wholly suspended for a period of three years, on condition that he was not convicted of the offence of malicious injury to property committed during the period of suspension.

[42] The appellant now appeals to this court, against both conviction and sentence, with leave of the magistrate granted on the 9th of May 2019.

[43] The following was common cause in the court a quo:

- (a) the appellant is an Inkosi, as defined in the KwaZulu-Natal Traditional Leadership and Governance Act, 5 of 2005 ("the Act");
- (b) the appellant exercised jurisdiction over the Emahlazeni Community, which is a traditional community recognised pursuant to the Act ("the community") and which is situated in the Nkandla area;
- (c) the appellant was also the chairperson of the Emahlazeni Traditional Council, which is a traditional council established by the community pursuant to the Act ("the council");
- (d) the complainant's father, Mzuzwane Amos Mpungose ("Amos"), and his mother, Thokozile Mpungose ("Thokozile"), resided within the community over which the appellant exercises jurisdiction;

- (e) the complainant did not however reside within the family homestead, but owned a house in KwaDlengeswa and worked in Vryheid;
- (f) the place where the poles had been erected formed part of the area that had been allocated to the Mpungose Clan by the forefathers of the appellant;
- (g) the Mpungose Clan contend that they had occupied the land for four generations;
- (h) the field where the poles were situated fell within that area and had been allocated to the complainant by his father, Amos;
- (i) the complainant had been informed by an Induna, Mkhize, to remove the poles but had not done so;
- (j) this fact was reported to the appellant by the Induna;
- (k) a meeting was then held on the 23rd of March 2016, between the appellant, the complainant and Amos, where the complainant was advised to remove the poles as he did not have permission to utilise the land where they had been installed;
- (l) the complainant did not remove the poles consequent upon that meeting;
- (m) the traditional council was advised of the foregoing and it resolved that the poles had to be removed and that the complainant would be assisted in removing them;
- (n) a letter was then addressed by the appellant to the complainant in which it is stated, *inter-alia*

“so that you should not be in problems you should not do what you are doing. This is the only lesson I can give. If you believe that I have destructed one of your rights, you should do what is right and go to court so that you can find help. As you have said that you won’t to be able to remove the poles, they are foundation [?], we will help you to remove them without paying”;

- (o) the complainant did not respond to the appellant’s letter but addressed a letter to the Department of Co-operative Governance and Traditional Affairs (COGTA) addressing the issue of the poles and the land;
- (p) persons, at the behest of the council and upon the instruction of the appellant, removed the poles by cutting them at their base;
- (q) the poles themselves were returned to the Mpungose homestead by the appellant and the Induna;

- (r) the poles were cut in such a manner that they were shortened in length and the concrete bases into which they had been mounted were left in the ground.

[44] The crime of malicious injury to property is committed when a person unlawfully and intentionally damages the property of another. As far as the elements of the offence are concerned therefore, the State succeeded in establishing that the complainant's property, namely the poles, were damaged upon an instruction being given by the appellant that they be removed from where they had been erected by cutting them at their base. It is evident from the schedule of photographs put up by the State that the poles were so cut, but otherwise appeared to be intact. The issue for consideration therefore is whether the State established that the appellant had the necessary *mens rea* to be found guilty of the offence.

[45] The form of *mens rea* required for this crime is intention and the ordinary principles of criminal law relating to intention apply.¹ If the appellant had no authority to damage the property, but erroneously believed that he did, his liability may be excluded on the ground that he lacked the necessary *mens rea*. In *Shahmahomed v Hendriks and others*,² the Appellate Division held that

'Malicious injury to property is, by law, a crime; but, speaking generally, it would be sufficient defence to a criminal charge to show that the injury complained of had been committed in the bona fide assertion of a right whether the belief in the existence of that right was legally correct or not. Because the state of mind of the accused would negative malice, which is an essential element of the crime, see *Conradie v Kloppers* (10 S.C p. 189).'³

¹ *R v Pope* 1953 (3) SA 890 (C) at 894; *S v Kgware* 1977 (2) SA 454 (O). There is no presumption of malice, as was suggested in some earlier decisions. See A St O Skeen (updated by S Hooror) 'Criminal Law' 6 Lawsa 2 ed (replacement volume 2010) para 330.

² *Shahmahomed v Hendriks and others* 1920 AD 151.

³ *Ibid* at 158. See also JRL Milton: South African Criminal Law and Procedure: Volume II, Third Edition: at pg 776 where the following is stated

'Though there are some old cases which suggest that proof of an intentional injury to property casts an onus on X of proving lack of "malice", the true position is that the onus of proving all the elements of the crime remains on the State throughout. Proof of an intentional injury may, however, raise an inference (or "presumption" of fact) that all the elements the crime are satisfied, and thus oblige X to adduce evidence raising as an issue that he did not act unlawfully or, if he did, that he acted under a *bona fide* claim of right. But even if he does not adduce any evidence, the court may still not be satisfied beyond a reasonable doubt that he is guilty.'

In the matter of *S v Marshall*,⁴ a farmer shot dogs on his farm in the belief that they were trespassing and that he had the right to do so under a section of an ordinance. It however transpired that the dogs belonged to a hunt club with the right to hunt jackal on his farm. The court held that the farmer could not be convicted of malicious injury to property and that it was not necessary to decide the question whether or not the complainant's dogs were actually trespassing on the appellant's land. The court stated that

'If it appears from all the evidence reasonably possible that the accused did the act complained of in the bona fide and reasonable belief that he had the right to take the measures in question, he should not have been convicted of malicious injury to property. (See *Conradie v Kloppers*, 10 S.C. 189 at p. 191)'.⁵

[46] If the appellant therefor *bona fide* but wrongly believed that he was entitled to remove the poles, he lacked the unlawful intention necessary to constitute the crime. His intention must be proved subjectively and the application of an objective criterion, such as reasonableness, is consequently inadmissible. The test of intention is subjective and was stated thus in *S v Sigwaha*:⁶

'The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide'.

[47] The onus of proving the unlawfulness of the act rests upon the prosecution. In *R v Bhaya*,⁷ it was stated that,

'As was pointed out by CENTLIVRES, C.J., in *Rex v Mkize*, 1951 (3) SA 28 at p. 32, it is one thing to reject an accused's evidence on the ground that he has failed to establish

⁴ *S v Marshall* 1967 (1) SA 171 (O).

⁵ *Ibid* at 175.

⁶ *S v Sigwaha* 1967 4 SA 566 (A) at 570C–D. See also *R v Horn* 1958 (3) SA 457 (A) at 466G–H; *S v Sinzani* 1979 (1) SA 935 (E) at 939F.

⁷ See *R v Bhaya* 1953 (3) SA 143 (N) at 146F–G.

the truthfulness of his version, but it is quite another thing to reject an accused's evidence after bearing in mind that the onus of establishing its falsity rests on the Crown. In the present case the *onus* was upon the Crown to establish affirmatively that the appellant, in damaging the complainant's car, did so maliciously, and if the evidence left the matter in doubt, then the *onus* upon the Crown was not discharged. If, however, the *onus* had been on the appellant to establish that he did not act maliciously, this *onus* would not have been discharged unless his evidence were accepted. The distinction is of importance because the magistrate's reasons seem to me to indicate that he felt that unless he accepted the appellant's story the defence must fail. The true position is that if the appellant's story is one which might reasonably be true and which is inconsistent with his guilt, he was entitled to be acquitted.'⁸

[48] If reference is had to the appellant's version of events, he stated that he had been advised by one of his Indunas, Mkhize, in March 2017 that the complainant had erected poles in a place where he was not entitled to do so. The place was described as being where the complainant's parents had a homestead. The appellant was further advised that the Induna had informed the complainant that he was not entitled to erect the poles, but was informed by the complainant that the areas belonged to the Mpungose Clan. The appellant stated that, according to his records, the complainant was not listed as a person being entitled to occupy the Mpungose homestead. He stated that he was accordingly of the view that, as the land where the poles were erected lay fallow and had not been used for a considerable period of time, it had reverted back to "the nation". He was also of the view that the complainant was not entitled to utilise the land until he had received permission to do so from the council.

[49] A meeting was then held between himself, the complainant and Amos, where the complainant was told that he was not entitled to utilise the land where the poles had been erected and was instructed to remove them. The complainant however stated that it

⁸ *R v Bhaya* 1953 (3) SA 143 (N) at 149, was decided on the assumption that reasonableness of the belief was required. The correctness of the decisions on this point are open to question, since they do not conform to the subjective test of intention. See A St O Skeen (updated by S Hoctor) 'Criminal Law' 6 *Lawsa* 2 ed (replacement volume 2010) para 330.

would be difficult for him to remove the poles as they had been mounted in concrete and he was not resident in the area. The appellant also stated that the complainant then apologised to him and was then given a deadline that the poles had to be removed by the end of May.

[50] The complainant did not remove the poles as instructed. The appellant then reported this fact to the traditional council. The council was informed by the appellant that, as the complainant had advised him that it would be difficult to remove the poles, he should be assisted in this regard. The council then took the decision to assist the complainant in removing the poles. The council also took the decision that they should cut the poles and then return them to the Mpungose homestead.

[51] The appellant then addressed a letter to the complainant stating that, since it would be difficult for him to remove the poles, the council would assist him with removing them. He emphasised that it was not him that was going to assist, but the council. When the complainant did not respond to the letter, he arranged for people to cut the poles and remove them. It was he, in his position as chairperson of the council, that requested the Induna to implement the decision of the council to remove the poles. The appellant was later advised by the Induna that the poles had been cut and he assisted in returning the poles to the Mpungose homestead by utilising his vehicle.

[52] Under cross-examination, the appellant clarified that any reference to "we" in his letter included him. He conceded that it was him, as the chairperson of the council, that had made the arrangements to remove the poles, as the council had taken the decision to remove them after it had received the request from the Induna. He maintained the view that he and the council were "assisting" the complainant in removing the poles. He was of the view that the complainant was endeavouring to fence off the land for his exclusive use without following the proper procedures.

[53] If reference is had to the complainant's evidence, he stated that everyone in the neighbourhood knew that the land belonged to the Mpungose Clan, but conceded that

the Induna might not have known this, as he was new. As regards the meeting with the appellant, the complaint stated that there was a meeting between them regarding the poles, but that no agreement was reached. He admitted receiving a letter from the appellant stating that he had to remove the poles. He also conceded that the letter "contained words" stating that if he was not satisfied, he must go to court to get some help. He therefore wrote to COGTA. He did not know that he was not recorded as a member of the Mpungosi Clan in the appellant's records.

[54] There is accordingly nothing in the complainant's evidence that gainsays the appellant's version that he was at all times of the opinion that the complainant was not entitled to erect the poles and that it was incumbent upon him, as the Inkosi, to ensure their removal. If anything, he confirms the appellant's version that a meeting was held where he was instructed to remove the poles, that he thereafter did not do so and received a letter from the appellant, addressed to him in his capacity as the chairperson of the traditional counsel, instructing him to remove the poles, and that, if he was not able to do so, the council would help him to remove the poles without charge.

[55] Amos, the complainant's father, was called in evidence by the State. He took the State's case no further than to confirm that the land where the poles had been erected had been allocated to the Mpungose Clan. It had been allocated to his great-grandfather by the then Inkosi. He did however confirm that the land had not been ploughed for some time because of the rainy conditions that had prevailed. He also confirmed that the complainant did not go to the appellant to "*khonza*" and obtain permission to utilise the land concerned. He also did not have much recollection of the meeting held between his son and the appellant.

[56] Thokozile, the complainant's mother stated in evidence that her son had been told by the appellant to stop ploughing, although she contends this was only for a while. She stated that the Induna had told the complainant to stop erecting the poles and that he had also been told to remove them, but did not do so as he was of the opinion that they were "rightfully installed". She confirmed that she was aware of the meeting being held

between the complainant, Amos and the appellant about the removal of the poles. She was advised that it had been agreed at the meeting that the complainant and his uncle, Abednego, would remove the poles. Her evidence also does not gainsay that of the appellant.

[57] Of significance however is her evidence regarding what transpired on the morning in March 2017, when the Induna attended upon her homestead. Upon greeting him, he informed her that he and the appellant were returning the poles and that the complainant was not being charged any money for removing them. She then went to greet the appellant, who also confirmed that the poles had been removed from where they had been erected and that the complainant was not going to be charged any money for removing them. This, if anything, confirms the appellant's state of mind at the time of the incident. It fits in with the appellant's version that he believed that he was carrying out his duties as an Inkosi in directing that the poles be removed and in assisting in returning them to the Mpungose homestead. There is simply no reason why he would act in such manner if he did not genuinely believe that he was carrying out what had been resolved by the council regarding the removal of the poles.

[58] In argument, counsel representing the State made reference to the case of *Ingonyama Tust v Radebe and others*,⁹ where the traditional law and customs are set out. He submitted that, in accordance therewith, the appellant was not entitled to alienate

⁹ *Ingonyama Tust v Radebe and others* [2012] 2 All SA 212 (KZP), where the following was stated:

"[40] . . . Under traditional law and customs, the land occupied by a particular tribe is administered and held in trust by the Inkosi and his or her *izinduna* for the benefit of the members of the tribe or community concerned. Each family head has the right to be allotted a family home site, arable land and the right to graze his livestock on the pasturelands. The land is allotted to an individual without requiring any return in the nature of a purchase price. Individuals' holding of a portion of the land, is inviolable and inheritable . . .

[41] An individual coming into another tribe, obtains permission to settle from the head of the homestead in which he settles. The head of the homestead in turn obtains the permission from the Induna of the ward. .

[42] When a man enters into marriage in a tribal land and requires land he usually chooses a suitable unoccupied portion and asks his prospective neighbours or the Induna of the area if he may take it. Alternatively, he may approach the Inkosi who would then consult the Induna of the area concerned . . . The Inkosi's right is a power to allot unallotted land and not a right to enjoy the use of allotted land or to take the fruits thereof. Similarly, the Induna has administrative duties in regard to land, not rights of ownership in land allotted to others. However, he has individual's rights in the portion allotted to himself on the same basis as everyone else."

land which had previously been allocated to the Mpongose Clan. It was his submission that once the land had been allocated to the Mpongose Clan, the right to hold the land is inviolable and inheritable. He therefore contended that the appellant did not have the authority to act in the manner in which he did and ought, in his position as Inkosi, to have known the provisions of the traditional law and customs and therefore known that his actions were wrongful.

[59] If one has reference to the evidence however, the appellant was not endeavouring to alienate the land, but was endeavouring to administer it by preventing the complainant from demarcating a portion thereof, which, in the appellant's opinion, was being done so as to utilise it for his exclusive use. Whether the appellant was correct in his assumption that the land had, by virtue of traditional law and custom, reverted to the nation, is not an issue for determination in these proceedings. What is relevant is whether the appellant was *bona fide* in that assumption and thereby did not have the necessary *mens rea* to commit the offence. In this regard, no evidence was led by the State to gainsay the appellant's expressed state of mind, nor was there any evidence led to suggest that he ought to have known, by virtue of his knowledge of traditional law and custom, or otherwise, that he was not entitled to act as he did. This was an issue not canvassed in the court *a quo*, nor was any evidence led in this regard. The State simply relied on the evidence of the complainant and his parents to prove its case against the appellant. As outlined above, I am of the view that this evidence, if anything, supports the appellant's version as to his state of mind.

[60] This being so, I am of the view that the appellant's version is one which is inconsistent with his guilt and is also one which might reasonably be true. He is therefore entitled to be acquitted. If reference is had to the judgment, the learned magistrate focused on the appellant's actions and not his state of mind. In doing so the court *a quo* misdirected itself and erred in coming to the conclusion that the State had proved all the elements of the offence beyond reasonable doubt. This being so, this court is entitled to interfere with that decision.

[61] I am accordingly of the view that the appeal on conviction ought to succeed and the verdict of the magistrate ought to be altered to one quitting the appellant.

[62] The following order is therefore made:

- (s) the appeal on conviction is upheld;
- (t) the order of the learned magistrate for the District of Nkandla, handed down on the 18th of December 2018 on both conviction and sentence is set aside and is replaced with the following:

“The accused is found not guilty and discharged”.



TOPPING AJ

APPEARANCES

Case Number : AR 174/2020

For the Appellant : G Lepan

Instructed by : Ngwenya & Zwane Attorneys
EMPANGENI

For the respondent : K.M. Shah

Instructed by : Director of Public Prosecutions
PIETERMARITZBURG

Heard : 26 February 2021

Judgement delivered on :