



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.1568/2013

In the matter between:

CHIEF ZULULELIHLE MASEKO N. O.

Applicant

And

BHEKWAKO DLAMINI

1st Respondent

BOY BOY MASEKO

2nd Respondent

LUCKY MASEKO

3rd Respondent

MADONDO DLAMINI

4th Respondent

MUZI MASEKO

5th Respondent

THABSILE MASEKO

6th Respondent

COMMISSIONER OF POLICE

7th Respondent

Neutral citation: *Chief Zululelihle Maseko N. O. and Bhekwako Dlamini & 6*

Others (1568/2013) [2014] SZHC 125 (19 June 2014)

Coram: Hlophe J
For the Applicant: Mr. T. Dlamini
For the Respondents: Mr. S. Gumedze
Dates Heard: 11 October 2013
Judgment Handed Down: 19 June 2014

JUDGMENT

- [1] The Applicant who alleges that he is a Chief of Kaluhleko area in the District of Manzini instituted these proceedings seeking inter alia an order of this court operating with immediate and interim effect calling upon the first Respondent, a resident of Kaluhleko area, to within 24 hours of this order, remove the fence he erected at a certain identified piece of land at Kaluhleko, allegedly meant for the construction of the area's Umphakatsi or Chief's Kraal. The Applicant further sought an order interdicting the 1st – 6th Respondents or those acting at their behest from holding community meetings at the old Umphakatsi without his authority as Chief of the area.
- [2] In support of his contention that he is the Chief of Kaluhleko area, the Applicant annexed as annexure AG1, a certificate of his appointment as

the Chief of Kaluhleko, which it is common cause was signed by His Majesty King Mswati III in his capacity as the authority empowered to appoint Chiefs in accordance with Section 233 of the constitution of the Kingdom of Swaziland.

[3] In support of his application, the Applicant contends that he is the son of the late Chief of Kaluhleko area, and was appointed to succeed his late father, Chief Mfanawenkhosi Maseko. He contends that after his having been appointed Chief of Kaluhleko area, there was identified an area by the Umphakatsi where his new Umphakatsi was meant to be established or built. The area concerned he says, was part of an area that had previously been designated by the authorities of the area as an agricultural showcasing piece of land where members of the public who had a passion to do so, were allowed to plough and plant crops of their choice as a means of expressing their agricultural prowess and showcase the produce.

[4] This project became defunct as time progressed such that it was with time, and precisely around 1996 called off or abandoned with the members of the public being notified by the authorities that as the land concerned had realistically belonged to no one or been allocated to no one in particular outside the purpose stated above, it was then being returned

to its owner the Umphakatsi after which it was to be used to construct the then intended Umphakatsi belonging to the Applicant as the newly appointed Chief of the area.

[5] The Applicant contends that the decision reclaiming the piece of land back to the Umphakatsi was respected and complied with by all the members of the public and Umphakatsi except the first respondent who refused to respect the said decision and also failed to heed it, allegedly claiming that he did not recognize the Applicant as the Chief of the area because according to him he was not legitimate. The first respondent was however allegedly refusing to heed the Applicant's summons as a Chief calling upon him to attend meetings with him to resolve this issue among others. This it is alleged resulted in a criminal case being instituted against the Respondent at the Manzini Swazi National Court, from where it was, at Respondent's counsel's instance transferred, to the Magistrates Court, as the Respondents through their attorney stated that they wanted to be represented by an attorney who had no right of audience in the Magistrate's Court.

[6] The Applicant further contended that the first respondent together with the second to sixth Respondents, were calling and holding public community meetings at the old Umphakatsi of his area without his

authority. He contends that the act of holding these meetings at the old Umphakatsi had the effect of undermining his authority as the Chief of the area.

[7] For these reasons the Applicant approached this court under a certificate of urgency for the orders of court inter alia directing and or ordering the first respondent to remove the fence he had put up on the land identified for the construction of the Applicant's Umphakatsi as well as another order interdicting and restraining the 1st to 6th Respondents or those acting at their behest from holding meetings and summoning community members to attend such meetings at the old Umphakatsi.

[8] To give effect to the orders sought, there was also sought an order of this court directing the members of the Royal Swaziland Police to assist the Deputy Sheriff in executing the orders concerned. There was further sought an order for costs against the first to sixth Respondents in the event of unsuccessful opposition of the Application.

[9] The first to sixth Respondents opposed the application by means of an answering affidavit deposed to by the first Respondent who is supported by the other Respondents by means of confirmatory affidavits deposed to by them.

[10] Their case was, in summary that this court had no jurisdiction to determine this matter in terms of Section 11 of the Swazi Courts Act No. 80 of 1950 as read with Section 151 of the Constitution of Swaziland as well as because it was already pending before the Swazi National Court where from it was referred to by the Manzini Magistrates Court at the behest of the first Respondent.

[11] The Respondents contended further that the matter was attended by a real dispute of fact which made application proceedings unsuited for its determination. In so far as the dispute of fact was allegedly foreseeable as at the time the proceedings were instituted, the Respondents asked that the application be dismissed with costs.

[12] The Respondents further contended that the matter was not urgent and that such urgency as may be conceived was of the Applicant's own making. This, it was contended, was because of the time it took the Applicant to institute these proceedings after having noted the alleged anomalies. There was also a contention that the Application did not meet the requirements of Rule 6 (24) (b) because the Applicant had allegedly not stated why he would not be afforded substantial redress in due course.

[13] In the merits first Respondent disputed that the land he had fenced and in which he was not removing the said fencing from was part of the land returned to the Umphakatsi. He claimed that same amounted to his fields and further claimed that the directive to return the said land was without substance as he was not being given alternative land contrary to the dictates of Swazi Law and Custom. He went on to insinuate that the Applicant was not the proper authority for the area because His Majesty had allegedly been misled into appointing him as the Chief. He said the Maseko's concerned had nominated somebody else; one Thami Maseko who died before His Majesty could appoint him the Chief of the area. It was contended that the respondents were currently seeking authority with His Majesty the King for them to challenge the Applicant's appointment.

[14] It was further claimed by the Respondents in the merits and per their Heads of Argument that even if the Applicant was a properly appointed Chief of Kaluhleko area, he was not in law entitled to deprive the Applicant of his land or the land in question without due process and without the first Respondent having been given a hearing.

[15] Before dealing with the legal issues raised or engendered by the papers placed before me, it is paramount that I do a recordal of those facts I considered to be common cause. It is therefore not in dispute that the

Applicant is currently the appointed traditional or competent authority or Chief of Kaluhleko area as envisaged the Swazi Administration Act of 1950, he having been appointed by the King or the Ingwenyama in accordance with Section 233 of the Constitution of the Kingdom of Swaziland. The Applicant's authority is however being challenged by the Respondents because according to them, he was not legitimate.

[16] It is further common cause or at least is not seriously being disputed in so far as there are no facts being pleaded other than a bare denial, that way back in 1996, and after the process of using the land concerned for showcasing purpose had become defunct, the people occupying the land in dispute were informed to remove their fences and return the land to the Umphakatsi. It also deserves mention that other than claiming that the land belongs to him, the first Respondent does not give details on how he came to occupy the land leaving the version by Applicant uncontroverted in this regard. It is further, not being disputed that meetings are held at the old Umphakatsi at the instance of the Respondents and without the Applicant's authority, when he is currently the appointed Chief of the area.

[17] Although a criminal case was reported by the Applicant with the police and was meant to be heard by the Swazi National Court, same could not proceed before the said court because the first respondent objected the matter being proceeded with before the said court and insisted that the same be heard before the Magistrates Court which wish was granted hence its pending before the said court. Closely related to this fact, is the one that the matter pending before the Manzini Magistrates Court is the criminal case against the first Respondent as contemplated by Section 9 of the Swazi Administration Act of 1950 which enjoins every Swazi resident in a place under a Chief's jurisdiction, to heed the summons by a Chief failing which, such a person commits a criminal offence and is not one for the determination whether the first Respondent can be ordered to remove his fence or not.

[18] The Respondent does not dispel the assertion made by the Applicant that he is occupying land initially meant for agricultural showcasing which is the one from which he is refusing to remove the fence he installed as he only makes a bare denial that the land concerned is not the same one.

[19] As concerns the point raised to the effect that this court has no jurisdiction to hear this matter as it concerns a matter of Swazi law and custom, it is not in dispute that the relief sought before this court as

against the first Respondent is a mandatory interdict compelling the first Respondent to remove his fence from the same land the Chief claims to have recalled years ago after the project for which it had been allocated had gone defunct. I do not see why this court cannot have power to issue a mandatory interdict where the requirements of it are met. For instance it is not dispute, that the Applicant as Chief of the area has the power to enforce the decisions of his Umphakatsi in terms of the Swazi Administration Act of 1950 as amended as he is the competent authority in terms thereof. He is also able to establish an injury that is on going alongside there being no other remedy available to him as the said authority. I clearly do not see why this matter cannot be heard by this court in exercise of its original and inherent jurisdiction as contemplated by Section 151 of the Constitution of Swaziland. Other than a bare assertion that this court has no such jurisdiction, I have not been referred to any facts establishing such lack of jurisdiction or supporting such a contention, nor have I been referred to any law in that regard. There is no law that says disputes arising out of Swazi Nation Land have to be dealt with only in terms of Swazi Law and Custom.

[20] I say this because I have no doubt that the cases cited in support of the contention particularly *The Commissioner of Police and Another vs Mkhondvo Maseko Civil Appeal Case No. 03/2011*, are clearly

distinguishable from the present one. Firstly in all such cases the person against whom the order was sought, had acted in the manner he did because he was allegedly supported in his conduct by the customary law which is not the case herein.

[21] In any event, first Respondent's argument is not consistent with his position in what he argues was the same pending matter. In the said matter, the first Respondent applied that the complaint lodged against him by the Applicant before the Swazi National Court be transferred from the said court to the Magistrates Court which is a court applying Civil Law like the High Court. Clearly in these circumstances the first Respondent is blowing hot and cold when he raises the point he does now. He himself believed that civil law was applicable to the related dispute and he cannot genuinely advocate the opposite only when it does not suit him. The position is long settled that a party is not allowed to blow hot and cold or to approbate and reprobate, which is what I find the Respondents to be doing.

[22] I have no hesitation that the point on this court having no jurisdiction as raised by the first Respondent cannot be upheld in circumstances like the present and the point concerned ought to be dismissed as I hereby do.

[23] On the point in limine raised with regards the *alibi lis pendens* objection, it was contended on behalf of the Applicant that the same matter is pending before the Swazi National Court where it was eventually referred to the Manzini Magistrates Court. It was contended this is not allowed in law. When a counter argument was raised by the Applicant, distinguishing the two matters, to the effect that they were different as one concerned a criminal matter arising from the preferment of criminal charges against the first Respondent for his failure to heed summons from his Chief whilst the other one pending before this court concerned a civil matter, and particularly an interdict calling upon the first Respondent to remove his fence from the land allegedly designated for building the new Umphakatsi as well as an interdict restraining all the Respondents from calling and holding meetings at the old Umphakatsi without the Applicant's authority; the Respondents responded by saying that what matters in *lis pendens* proceedings is whether the cause of action is substantially the same. It was argued that this was the case in the two matters. The common thread between the two matters, it was argued was the alleged failure by the first Respondent to heed the Chief's summons.

[24] Having listened to the argument raised, with regards the issue of the *lis pendens*, it seems to me that whereas the Respondents correctly captured the position of the law with regard to such matters, the facts of the matter

do not support the said position however. In other words the facts reveal that the causes of action in the two matters are not substantially the same. Whereas in the matter pending before the Magistrates Court the cause of action is the alleged refusal by the first Respondent to heed the Chief's summons, in the present matter the cause of action is the removal or the refusal thereof, of a certain fence from what has been argued as the designated area.

[25] The circumstances of these two matters therefore differ markedly from those raised in paragraph 75 of Isaacs' Becks' Theory and Principles of Pleadings in Civil Action at page 159, when he said the following which is relied upon by the Applicant:-

“Where the above essentials exist, the mere difference of form between the pending suit and that which is sought to stay is not material. Thus an action for damages for defamation will usually be stayed pending the decision in criminal proceedings for the same libel...”

[26] It is clear that a decision in the matter pending before the Magistrate's Court will not invariably decide the matter before this court as pointed out in the foregoing passages. The decision in the Magistrates Court will only decide whether or not the Respondents are guilty of failure to heed the Chief's summons calling them to appear before him than whether or not they are obliged to remove the fence complained off from the

intended cite of the Umphakatsi. For this reason, I cannot uphold this point which I hereby dismiss.

[27] On the issue of these proceedings being not suitable because there exists a dispute of fact as contended by the first Respondent. I am of the view that on most of the issues raised, the supposed dispute does not go to the root cause of these proceedings and can be determined on the papers as they stand. In fact in most of the alleged disputes of fact, I have no hesitation that the version by the Applicant is not controverted in such a manner as would comprise a dispute of fact as envisaged in the ***Plascon Evans LTD v Van Riebeck Paints (PTY) LTD1948 (3) SA 523 (A) at 534 H-I, case.*** That is to say it is not every dispute that would necessitate a resort to oral evidence to resolve. There are matters to be resolved on the papers irrespective of an existing dispute. This would be in those cases where the facts averred by the Applicant and admitted by the respondent taken together with those alleged by the Applicant justify such an order.

[28] When considering the fact that the Applicant is the overseer of all the Swazi Nation Land under his jurisdiction, in terms of the Swazi Administration Act of 1950 together with the improbabilities contained in first Respondent's case, it seems to me that the alleged dispute as raised

by the first Respondent is not real. It shall be remembered, it is not in dispute that only the first Respondent is refusing to comply with the Umphakatsi's decision notwithstanding everybody else having without it being denied, done so. It is clear that this dispute is superficial when considering that the first Respondent is frustrating the Applicant because he does not want to recognize him as the appointed Chief of the area. I have no doubt if the first Respondent was genuine, he most likely would have been the one to institute the interdictory proceedings against interference by the Applicant.

[29] For this reason, I will not uphold the point that there exist disputes of fact which prevent this matter from being decided on the papers particularly because it has been shown that the Applicant is the appointed traditional authority in the area. The position will be different if the appointment was reversed.

[30] There was also raised the question of urgency it being argued that the matter was not urgent and that such urgency as was conceivable was of the Applicant's own making as well as that there was no contention on why the Applicant was claiming he would not receive redress in due cause.

[31] This argument can be easily disposed of through an observation that all the parties have already filed their affidavits including the stating of their cases in full such that this question is, as of now, a mere academic one. In so far as no prejudice has been suffered in this regard, I am of the considered view that I do not need to decide whether strictly speaking it was urgent to institute the proceedings in the matter done where no prejudice was occasioned and all the papers were now before me. I must say I did not understand Respondent's Counsel to be still insistent on this point. This point can in the circumstances not be upheld and is therefore dismissed.

[32] There was also raised in the merits the question of entitlement or otherwise of the Applicant to the relief sought considering that the first Respondent was said not to have been given a hearing as regards the handing over of "his" land. Whatever the legalese on this point are, I however cannot agree that such an issue can be raised 18 years later when considering the realistically undisputed assertion that the Umphakatsi called for the land way back in 1996 and there was compliance by everybody else except the Applicant. Furthermore, the current proceedings have not been brought about as a review of the decision concerned. These proceedings are for an interdict enforcing an existing state of affairs which this court is told has held for about 18 years to date.

[33] I have no hesitation in concluding from the facts that the first Respondent's stance visa-a-vis the land in question is simply to use it as a tool to fight the legitimacy or otherwise of the Applicant. Whatever his stance in this regard it should not compromise public order. As they are aggrieved with the Applicant's appointment, they must appeal that decision to the appropriate authority without compromising peace and order in the concerned area.

[34] I therefore have no doubt that Applicant's application cannot succeed on this point as well.

[36] Concerning the second order, I have no hesitation to confirm that if the Applicant is the appointed Chief of the area as the papers indicate, then until his said appointment has been set aside as a result of whatever lawful steps taken, he is the only lawful authority over that particular area which he has to manage in terms of the existing laws. He cannot effectively administer such an area if there are people who call the community to meetings he knows nothing about as that turns to embarrass and undermine his authority. Things have to be done according to law. If anything warranted his interdiction from exercising the powers of a Chief, then there should be a lawful intervention in that regard. It is for this reason therefore that I have not understood there to

be a real challenge on the grant of the interdict restraining the first to sixth Respondents from holding meetings at what has been described as the old Umphakatsi without the Applicant's authority. To this end, I cannot see any hindrance to the grant of the order sought.

[37] Consequently, I am of the view that Applicant's application should succeed as prayed together with costs against the first to sixth Respondents.

N. J. HLOPHE
JUDGE - HIGH COURT