



**IN THE HIGH COURT OF SWAZILAND  
JUDGMENT**

**HELD AT MBABANE**

**Case No. 1380/2017**

**In the matter between:**

**CHIEF ZULWELIHLE MASEKO**

**1<sup>st</sup> APPLICANT**

**ATTORNEY GENERAL**

**2<sup>ND</sup> APPLICANT**

**And**

**THULANI RUDOLPH MASEKO**

**1<sup>st</sup> RESPONDENT**

**THE NATIONAL COMMISSIONER OF POLICE**    **2<sup>ND</sup> RESPONDENT**

**Neutral citation:            Chief Zulwelihle Maseko and Another v. Thulani  
Rudolph Maseko and Another (1380/17) [2017] SZHC  
284 2017**

**DATE HEARD:                13/11/2017**

**DELIVERED:                14/12/17**  
**CORAM                        M. FAKUDZE J**  
**J.MAGAGULA J**  
**D.TSHABALLA J**

RULING:

[1] In this matter the Applicants seek an order in the following substantive terms:

- a) That the 1<sup>st</sup> Respondent be interdicted from taking and /or claiming ownership or taking occupation of two pieces of land he has cleared for construction at KaLuhleko area near Bhunya in the Manzini District;
- b) That the 1<sup>st</sup> Respondent or any other person acting on his behest be interdicted from continuing with any development, construction or erection of any structure on the two pieces of land he has cleared and developed at KaLuhleko near the Respondent's homestead;
- c) Granting an order for the removal and demolition of any material put and structures erected by the Respondent on the land in dispute;
- d) That National Commissioner of Police (2<sup>nd</sup> Respondent) assists in effecting the order granted by the court.
- e) Costs of suit.

The application is supported by a founding affidavit deposed to by the applicant and it is opposed by the 1<sup>st</sup> Respondent who has also filed his answering affidavit in this regard.

[2] In his opposing affidavit the 1<sup>st</sup> Respondent raises several points of law in *limine* before dealing with the merits. It therefore

became necessary at the commencement of the hearing of the matter that the points raised in *limine* be disposed of first as some of them can have the effect of disposing of the matter if upheld by this court. We therefore allowed the representatives of the parties to present arguments on such points and reserved our ruling thereon. We now proceed to deliver our ruling.

[3] The points raised by the 1<sup>st</sup> Respondent are the following:

- a) Misjoinder of the Attorney General as the 2<sup>nd</sup> Applicant;
- b) Non - joinder of the Attorney General as a 3<sup>rd</sup> Respondent,
- c) Lack of jurisdiction by this court to hear and determine the application
- d) Non – joinder of the Land Management Board, and
- e) Disputes of fact.

[4] It would appear to us that the first point to be determined by the court is that of jurisdiction. This is so because if the court lacks jurisdiction as contended by the 1<sup>ST</sup> Respondent, then it cannot even hear, let alone determine the other points raised in *limine*. We shall therefore deal with this point first.

[5] The basis of the challenge on the jurisdiction of this court to hear the matter is that “ *the issue relating to the parties rights herein... is solely reserved for the country’s traditional structures and systems*”.

From this stand point it would appear that the court has to determine what is “ *the issue relating to the parties’ rights herein.*”

[6] The issue appears to be that the 1<sup>st</sup> Respondent wants to use land which he has not been using all along but which he claims has always belonged to his family and he inherited it. The 1<sup>st</sup> Applicant contends that the 1<sup>st</sup> Respondent has no right to use such land without his authorization. The question then is whether the 1<sup>st</sup> Applicant has a right to interdict the 1<sup>st</sup> Respondent from using land which was not allocated to him but to his family sometime back and which was not being used all along. Secondly, is this a matter which can only be determined by the traditional structures? The 1<sup>st</sup> Respondent maintains that the question whether or not 1<sup>st</sup> Applicant has authority to stop him from using the land in question can only be decided by

traditional structures and this court has no jurisdiction to determine same.

[7] The reason why 1<sup>st</sup> Respondent maintains that the said question can only be determined by traditional structures is that he contends that this is a matter of Swazi law and custom. This court has no jurisdiction on matters involving Swazi law and custom. We are unable to agree with this contention. The question of whether or not the 1<sup>st</sup> Applicant can stop the 1<sup>st</sup> Respondent from using the land in question is not necessary a matter of Swazi Law and Custom. It is just a question of whether or not the 1<sup>st</sup> Applicant has authority over the land in question. If the 1<sup>st</sup> Applicant has such authority then he can stop the 1<sup>st</sup> Respondent from using such land and if need be approach any court, including this court, for an interdict stopping the applicant from using such land.

[8] In our view there is therefore nothing stopping the 1<sup>st</sup> Applicant from approaching this court seeking the relief he is seeking. Whether or not somebody has authority over a certain piece of land is a question of fact and not of law. It is therefore not a

matter of Swazi law and custom and the jurisdiction of this court is not therefore ousted.

We accordingly find that we have the necessary jurisdiction to deal with this matter and to grant or refuse the interdict applied for.

[9] The other issue raised in *limine* is that of misjoinder of the 2<sup>nd</sup> Applicant. The 1<sup>st</sup> Respondent maintains that the 2<sup>nd</sup> Applicant should not have been joined as he has no joint financial or proprietary interest in the matter. In our view the question as raised by the 1<sup>st</sup> Respondent is a purely academic one as it does not in anyway affect the rights of the 1<sup>st</sup> Respondent. The question would have substance if it had been raised by the 2<sup>nd</sup> Applicant himself. The 2<sup>nd</sup> would be justified in objecting to his joinder since he would be liable to costs should the application be unsuccessful. The joinder of the 2<sup>nd</sup> Applicant does not affect any rights of the 1<sup>ST</sup> Respondent because should he loose he would not be required to meet two sets of bills of costs but only one.

[10] The other point raised by 1<sup>st</sup> Respondent is that of non – joinder of the Attorney General as 3<sup>RD</sup> Respondent. The 1<sup>ST</sup> Respondent

maintains that the Attorney General cannot act as a co – litigant as applicant and be a legal representative of the 2<sup>nd</sup> Respondent at the same time since he is by law enjoined to represent both the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Respondent.

This contention is quite valid and sensible. However again it is difficult to see how it advances the 1<sup>st</sup> Respondent’s case. What prejudice does the 1<sup>st</sup> Respondent suffer as a result of the non – joinder of the Attorney General as a 3<sup>rd</sup> Respondent. Points of law are raised so that they can lead to a determination of the matter one way or the other, not just for the sake of raising them. It is not clear how this point can affect a determination of the dispute before court. We accordingly make no determination on this point.

[11] On the question of disputes of fact, it is trite that it is material disputes of fact that can render a case undeterminable by application proceedings. In *casu* the real question is whether the 1<sup>st</sup> Applicant has authority over the land in question. Other disputes of fact are immaterial. In our view this question can easily be determinable on the papers. This point is accordingly dismissed.

The 1<sup>st</sup> Respondent has also raised the point on non – joinder of the Land Management Board. In this regard the 1<sup>st</sup> Respondent contends that “ *It is convenient and equitable to cite and join the Board as the institution responsible for the overall management and for the regulation of any right or interest in land whether urban or rural or vesting in Ingwenyama in trust for the Swazi nation.*”

In *casu* the 1<sup>st</sup> Applicant seeks an interdict against the 1<sup>st</sup> Respondent. The order sought does not in anyway affect the Land Management Board. There is no need to cite a party who has no interest in the matter. It is our finding therefore that there is no merit in this point and it is accordingly dismissed.

[12] Having found no merit in all the points raised in *limine* we make the following order:

1. The points raised in *limine* are hereby dismissed.

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**J.S MAGAGULA J**

**I agree,**

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**M.R FAKUDZE J**

**I agree,**

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**D.TSHABALALA J**