

IN THE HIGH COURT OF SWAZILAND

Civ.T.450/93

In the matter of

RAY SIBANDZE

Applicant

and

THE ATTORNEY GENERAL IN HIS CAPACITY  
AS GOVERNMENT REPRESENTATIVE

1st Respondent

THE CITY COUNCIL OF MBABANE

2nd Respondent

THE MINISTER OF HOUSING & URBAN  
DEVELOPMENT

3rd Respondent

CORAM : Hull, C.J.  
FOR THE APPLICANT : Mr. Selvan and Mr. Matsebula  
for the Applicant  
: Mr. Wimalaratne for the first and  
third respondents  
: Mr. Cloete for the second respondent

O R D E R  
(13/04/93)

Hull, C.J.

On 5th April 1993, the applicant Mr. Ray Sibandze, who is the Town Clerk of the Mbabane City Council, filed a notice of motion seeking an order in the following terms:

- (a) That the "forms and services" prescribed by the rules of this court be dispensed with and the matter heard as one of urgency:

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- (b) That so far as necessary, special leave be granted to the applicant under section 116(3) of the Urban Government Act No. 8 of 1969 for the application to be heard without the notice required under subsection (2) of that section:
- (c) That two resolutions allegedly passed in meetings of the Mbabane City Council, on 5th November 1992 and 18th March 1993 respectively, be declared unlawful and of no effect:
- (d) That the proceedings of the management committee of the City Council, whereby Mr. Sibandze was allegedly disciplined and ordered to resign under paragraph 7(e) of section III of the Council's Staff Standing Orders be set aside:
- (e) That the Council be ordered to pay the costs of the application:
- (f) That Mr. Sibandze be granted further or alternative relief:
- (g) That the respondents should deliver to Mr. Sibandze's attorneys their opposing affidavits not later than 7th April, 1993.

The date of hearing specified in the notice of motion was 8th April 1993 at 9.30 a.m. The application was supported by a certificate of urgency given by Mr. Sibandze's attorneys of record.

The nature of the application, put as shortly as I can, is that Mr. Sibandze alleges that from June of 1992 onwards, certain members of the Council have made concerted efforts

to bring about his removal as Town Clerk, culminating in a resolution passed at a special meeting of the Council held on 18th March 1993 asking him to resign by 31st March 1993 under paragraph 7(e) of section III of the Staff Standing Orders, and also resolving that a report should be sent to the Minister of Housing and Urban Development under paragraph 12 of that section of the Standing Orders. On Mr. Sibandze's own papers, there is a question as to the exact terms of the alleged resolution, but he is asserting also that the Council's conclusions do incorporate an intention that his services should be terminated on that day if he did not resign as requested.

He alleges on various grounds that the purported decision of the Council is a nullity or is wrong and unlawful. These grounds are specified in paragraph 4 of his founding affidavit.

When the matter first came before me on 8th April, Mr. Wimalaratne indicated that the third respondent - the Minister - will abide by the decision of the court and that neither the first respondent nor the Minister therefore proposed to take part further in the proceedings.

For the Council, Mr. Cloete has taken three points in limine, on which I now have to rule. These are in turn -

- (a) That on the papers filed by Mr. Sibandze no urgency is shown;
- (b) that the papers do not make out a case for the granting of special leave under section 116(3) of the Act;
- (c) that the applican is out of order, because it is premature.

As I understand the last of these submissions, he is saying two things. The first is that the Minister has not yet made a decision whether or not to conform the Council's conclusion in respect of Mr. Sibandze, as it falls to him to do under section 50(2) of the Act. The second is that in any event, Mr. Sibandze has not yet exhausted his other remedies - specifically a right of appeal that he is said to have under the relevant legislation.

Under rule 6(25)(a) of the rules of this court, the court may in case of an urgent application dispense with the forms and service provided for in the rules and may dispose of the matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of the rules) as the court thinks fit.

Paragraph (b) of the same sub-rule requires an applicant to set forth explicitly the circumstances in which he avers that the matter is urgent and also requires him to set forth explicitly the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

By reason of section 116(2) of the Urban Government Act 1969, no legal proceedings of any nature shall be brought against a council in respect of anything done or omitted by it under the Act, after its commencement, until 30 days written notice of the intention to bring the proceedings have been served on the council. Particulars of the alleged act or omission are to be given clearly and explicitly in such notice. The subsection in my judgment refers to all such proceedings, because the opening words "No such action" are plainly a reference to proceedings so described in subsection (1).

Subsection (3) goes on to provide that on the application of a claimant debarred by subsection (2) from instituting proceedings against a council, the High Court may grant him special leave to do so if (in the present context) it is satisfied either that the council will in no way be prejudiced by failure to give or delay in giving the required notice or that having regard to any special circumstances, the person proposing to institute the proceedings could not reasonably be expected to have complied with the requirements of section 2.

Mr. Cloete contends, in respect of rule 6(25), that Mr. Sibandze has failed to set out in his papers explicit reasons that show that the matter is urgent and has also failed to set out explicit reasons why he could not be given substantial redress at a hearing in due course.

In respect of the requirements of section 116 of the Act, he argues first that it is for Mr. Sibandze to show that no prejudice will be caused to the Council if special leave is granted as sought. He contends further that the use of the words "to have complied" in paragraph (b) of subsection (3), in relation to the requirements (inter alia) of subsection (2) implies that 30 days must have elapsed before special leave may be sought. Finally, he submits that Mr. Sibandze has not shown special circumstances why special leave should be given under subsection (3).

Mr. Cloete also makes the point that no prior notice of any kind of the application was given to the Council despite a continuing history of the matter over some months.

Section 116 is an enactment of Parliament imposing requirements for the giving of notice to municipal councils such as the Mbabane City Council before legal proceedings

can be brought against them. The rules of the High Court, being legislation of a subordinate, delegated nature, are not properly to be construed as empowering the Court to abrogate the requirements of the section otherwise than in the circumstances contemplated in subsection (3). The first issue, in the case of this proposed legal proceeding against a municipal council, is to decide whether or not Mr. Sibandze has made out on his papers a case for granting special leave under subsection (3). If he has done so, then the court has to go on to consider whether on his papers he has made out a case for urgency under rule 6(25). These two questions are closely related, but in principle I consider that the correct approach is to deal with the first two points in limine in the reverse order from that in which they were dealt with by counsel.

The first two submissions made by Mr. Cloete in respect of section 116 cannot in my view be sustained. Subsection (3) does not require a prospective applicant to show both that the Council will not be prejudiced by short notice and that there are special circumstances why he could not reasonably be expected to have complied with subsection (2). It is sufficient if he brings himself within either one of those cases. I have some difficulty following the second submission and have come to the conclusion that it cannot be sustained.

The real issue here is whether Mr. Sibandze's papers show prima facie that, because of special circumstances, he could not reasonably be expected to have complied with subsection (2).

In his founding affidavit, having first deposed in paragraph 3(d) that the Council passed its resolution on 18th March, calling on him to resign, and having also annexed at RBS1

what he identifies as a copy of the minutes of that meeting, Mr. Sibandze then goes on in paragraph 3(e) to state that he subsequently received a letter dated 19th March from the Mayor and Chairman of the Council. He also states that a copy of this letter is annexed to his affidavit at RBS2". According to its tenor, this letter purports to inform him of the terms of the resolution, but it differs in one respect from the resolution described by him in the copy of the minutes, for it goes on to provide that failing his resignation by 31st March, his services should be terminated as at that date. Then each of the two versions of the resolution goes on to say that a report should be forwarded to the Minister under paragraph 12 of section III of the Standing Orders.

The letter of 19th March from the Mayor concludes with the words: "Please regard this as the notification of the decision (Resolution) in terms of paragraph 9(3) of the Staff Standing Orders (section III), in the event that you wish to appeal to the Minister".

According to paragraph 3(g) of his affidavit, Mr. Sibandze then received a further letter from the Mayor dated 25th March. He annexes at RBS3 what he deposes to be a copy of this. According to its tenor, it informs Mr. Sibandze that the report has now been submitted to the Minister under the Standing Orders. It informs him again of his right of appeal, provided this is exercised within 15 working days of 19th March - i.e. by 13th April, which is today. It concludes by saying "However I would not expect you to be in office from the 1st April 1993 onwards, until such time as the Minister has either taken a decision on your appeal, or on the resolution of the Council".

In paragraph 10(c) of his affidavit, Mr. Sibandze states that on 1st April, the Mayor advised him to take leave until 13th April. I have already adverted to the fact that in paragraph 4, at sub-paragraph (b), he sets out the grounds on which he contends that the Council's decision is a nullity or is wrongful and unlawful. The first is that he contends that the standing orders do not permit disciplinary charges to be brought against the Town Clerk. The next is that the procedure followed was vitiated by gross irregularity in that the "prosecution" was undertaken by the management committee, which then submitted its findings to the full Council for confirmation. The third is that the proceedings were vitiated by a failure to afford him natural justice and, in particular, a fair hearing. The last ground alleged is that the Management Committee and in particular its chairman, were not impartial, but rather were judges in their own cause.

Thereafter in his affidavit, Mr. Sibandze sets out in detail the allegations of fact on which he bases these grounds.

One of the main purposes of the requirements of section 116(2) as to the giving of notice is in my view to inform a municipal council clearly of the allegations that are being made against it. I think it would be going too far however to construe this to mean that the claimant must demonstrate a sustainable legal cause of action. What he is required to do, in my view, is to state clearly and explicitly the facts on which he intends to rely.

In one respect, namely in the annexing to the founding affidavits and the numbering of the exhibits which are referred to in the affidavits as RBS8, RBS9, RBS11, RBS11a, RBS12 and RBS13, the papers are not clear. There appears to have been some misunderstanding and confusion in compiling these exhibits in sequence.



But subject to that however, I do consider that Mr. Sibandze's founding affidavit does set out clearly and explicitly the facts on which he proposes to rely in order to seek to show that he is entitled to legal redress. More especially, the body of the affidavit itself does so. It is clear in my view what he is alleging as a matter of fact. It is unnecessary and inappropriate in my view to go into the merits, even on a prima facie basis, of those facts at this time. The issue is whether there are special circumstances, within the meaning of section 116(3), why he should be allowed to proceed on short notice.

The affidavit deals at paragraph 10 with the question of urgency. In sub-paragraph (b), Mr. Sibandze refers to the importance of his position which he describes as being tantamount to the general manager and chief executive of Mbabane. He refers to his own interests and that of local government in Mbabane. He avers that it is of the first importance that the Court should decide authoritatively whether "the purported termination" of his employment as at 31st March was lawful. In the following paragraph he refers to the expectations of the Mayor that he will not be in office from 1st April onwards, and states that he fears that after 13th April his position will be precarious and he will not be able to remain in office. He also asserts that it is obviously conducive to conflict and uncertainty in the hierarchy of the Council's staff if the dispute is not resolved. In paragraph (d) he asserts that it is important, having regard to the responsibilities of the Town Clerk, that there should be no uncertainty as to the person who holds the post.

In the circumstances of this particular case, before ruling on this first point in limine I want to proceed first to the second point. Both of them are on my view closely related.

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Although section 116(3) does not explicitly refer to urgency, it is, by necessary implication in my view, a central consideration in deciding whether or not there are special circumstances justifying short notice for the purpose of the Act - or at least, in almost every circumstance that I can envisage, it will be so. Section 116(3) itself does not require, in terms, that the special circumstances shall be identified explicitly, and it does not stipulate that a claimant must show why he cannot be afforded substantial redress at a hearing in due course.

But in this respect too, I think that in practical terms, in the present circumstances, there are close connections between the requirements of section 116 and rule 6(25). If a claimant cannot in fact demonstrate prima facie on an application under section 116 why the matter is urgent and why he may not get substantial redress in due course, then it seems to me that he is unlikely to be able to show special circumstances in a particular case.

Mr. Sibandze is the Town Clerk of the City of Mbabane. Without wishing to anticipate the merits of the matter, and while keeping in mind that his relationship to the members of the Council and the management committee are, even on his own papers, likely to be an important issue in these proceedings, I note that in section 48(2) of the Act, the Town Clerk is described as the chief executive and administrative officer of a council. His appointment and removal are, ultimately, matters that require the approval of the Minister. He holds, undoubtedly, an important post in municipal administration. Under section 27 of the Act, he has an important statutory responsibility in respect of acts or omissions that may result in maladministration. Again I keep in mind that, even on his own papers, his discharge of that function may be a live issue

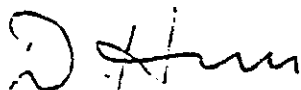
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in these proceedings. Nevertheless it is apparent from section 27 that he has an independent function in that respect.

On these first two points in limine, on the whole of his papers, I consider that he has succeeded in showing that there are special circumstances why he should be allowed to proceed on short notice, and I also consider that he has shown with sufficient explicitness why the matter is urgent and why he claims that he cannot receive substantial redress at a hearing in due course.

What Mr. Sibandze is contending is that if he is not allowed to prosecute his claim on a basis of urgency, his position as chief executive officer of the Mbabane City Council will from today, 13th April, be in jeopardy. He is saying, on the basis of allegations of fact on which he will seek to rely to sustain legal remedies at the substantive hearing of this matter, that because of fundamental irregularities, the steps that have so far been taken against him are unlawful and are nullities. If he sustains those allegations, he would be entitled clearly to redress here, whether or not the processes of ministerial approval and of appeal have been completed. He is also saying that, because of the nature of his position and his responsibilities, the validity or otherwise of the action that has so far been taken against him should be decided upon as a matter of urgency in his own interest, and the interests of local government administration and of the staff of the Mbabane City Council.

In these circumstances, I am of the view that all three objections that have been taken in limine fail.



David Hull  
CHIEF JUSTICE