IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 1356/2008

SIKHATSI DLAMINI AND 10 OTHERS Applicants

In Re:

THE MINICIPAL COUNCIL OF MBABANE 1st Applicant

FELIX MATSEBULA 2nd Applicant

ZEPHANIAH NKAMBULE 3rd Applicant

BENEDICT BENNETT 4th Applicant

And

THE CHAIRMAN OF THE COMMISSION OF
ENQUIRY INTO THE OPERATIONS OF
THE MUNICIPAL COUNCIL OF MBABANE 1st Respondent

THE HONOURABLE MINISTER FOR HOUSING
AND URBAN DEVELOPMENT 2nd Respondent

ATTORNEY GENERAL 3rd Respondent

Coram: S.B. MAPHALALA – J

For the Applicants: MR. N. HLOPHE

For the Respondents: MR. V. KUNENE with
MR M.VILAKATI both Crown Counsel in the Attorney General's Chambers

JUDGMENT
30th April 2008

Introduction

[1] The Applicants are elected Councilors of the Mbabane Municipal Council who were dismissed by the Minister for Housing and Urban Development on the grounds that they defied his order to implement recommendations of a commission of enquiry report. The said Order was issued in terms of Section 107 (3) (a) of the Urban Government Act (the Act).

[2] On the 15th April 2008, the Applicants filed before this court their first application for the following relief:

1. Dispensing with the normal provisions of the Rules of this Honourable Court as relates to form, service and time limits and to hear this matter as an urgent one.
2. Interdicting and restraining the 2nd Respondent from putting into effect Section 107 (4) (a) or (b) or of the Urban Government Act or any other similar clause pending the outcome of this matter.
3. Reviewing, correcting and setting aside the findings and recommendations of the Commission of Inquiry into the affairs of the Mbabane Municipal Council.
4. Directing that prayer 2 hereinabove operates as a rule *nisi* with immediate and interim effect returnable on a date to be determined by the above Honourable Court.
5. Granting Applicants the costs of this application in the event of opposition hereto.
6. Granting Applicants any further and/or alternative relief.

[3] The said application was brought as a matter of urgency at 2.15pm on Tuesday the 15th day of April 2008. When the matter was called the Applicants applied to file another application as a result of changed circumstances being that the Minister had already dissolved the Council and replaced it with another. The court was urged to put in place an interim interdict that the Minister should keep the status *quo ante* until the matter has been resolved by the court. The court ruled that it cannot stop the Minister in the exercise of his lawful functions.

[4] This second application sought the following relief:

1. Dispensing with the normal provisions of the Rules of this Honourable Court as relates to form, service and time limits and to hear this matter as an urgent one.
2. Setting aside or interdicting implementation of the Ministerial Order dissolving the

Council of Mbabane pending the finalization of the main application herein, alternatively

3. Directing the 2nd Respondent to restore the *status quo ante* existing prior to his issuing the Ministerial Order referred to above, alternatively

4. Granting such order that this Honourable Court deems fit to protect the *status quo ante* existing prior to the Minister issuing the Order referred to above.

5. Granting Applicants the costs of this matter at attorney-client scale.

6. Granting Applicants any further or alternative relief as the case may be.

[5] This judgment is concerned with the above cited application. Both Counsel advanced their arguments on the 17th April 2008, for the whole day and they also filed very useful Heads of Argument for which I am grateful.

[6] This application is founded on the affidavit of Mr. Sikhatsi Dlamini who is the Mayor of the 1st Applicant where he has related the pertinent facts in this matter. In the said affidavit a number of arguments are canvassed, *inter alia*, at paragraph 8 thereof that:

> "In the circumstances, being issuing the order aforesaid none of the Applicants were given a hearing. This failure to give a hearing is inconsistent with the Bill of Rights in the Constitution particularly Section 33 thereof which obliges an administrator authority to give a person appearing before it a hearing and to treat such a person justly and fairly including observing the requirements of natural justice or fairness including giving such person the right to approach court and challenge a decision taken against him with which he is aggrieved".

[7] Further on, in paragraph 9 Applicants' states as follows:

> "...the 2nd Respondent's order referred to above was issued arbitrarily without the Applicants having been heard and is unjust and unfair contrary to the constitutional provision referred to above".

The facts

[8] I think it is imperative to outline a summary of the facts in this case for a better understanding of the dispute between the parties. The Applicants are Counselors of the Municipal Council of Mbabane. The 1st Respondent is the Chairman of the Commission of Enquiry into the affairs of the Municipal Council of Mbabane who is in terms of Rule

53 of the High Court, is a proper Respondent in matters of this nature. The 2nd Respondent is the Honourable Minister of Housing and Urban Development, cited herein in his capacity as the officer who established the Commission of Enquiry. Sometime in February 2007, the 2nd Respondent established a commission of enquiry into the affairs of the Municipal Council of Mbabane by means of the Government Gazette annexed as "CM1". The members of the said commission appear *ex facie* the said Gazette.

[9] The said Gazette stated that such commission was established in terms of Section 107 of the Urban Government Act of 1959 which spells out the issues that may make a Minister to establish a Commission of Enquiry. The said Commission, although was initially meant to take a few months ended up running for about 9 months, when the giving of oral evidence and submissions was made in September of 2007 whilst the report itself would not be released until the end of February 2008. Throughout the hearing, the 1st Applicant engaged the services of Attorneys Magagula and Hlophe to represent it, which they did. At the time the Commission of Enquiry was instituted, the 1st Applicant then Councilors were in the last year of their term which came to an end at the end of September 2007, followed by elections, where new Councilors were elected in November 2007, whereafter they assumed office. Several officers in the current council were councilors in the previous one. Sometime in March 2008, the 2nd Respondent called the Councilors and availed them a copy of the report with certain recommendations which he directed that be implemented within certain time frames.

[10] Council has considered the Commission's report and taken advise on its implications. It was decided or resolved by the councilors of the 1st Applicant, that the said report be challenged through a review at the High Court with a view to setting it aside, among other things that some of the findings are not based on findings of fact but based on speculations and opinion for instance the finding or recommendations that a certain academic qualifications be stipulated as a basic

minimum for election into the Council, yet no evidence was led to show that whatever problems there are, if any, a City Council are cause by the lack of certain basic qualifications by Councilors.

[11] The Applicants contend that the Commissioner failed to proceed fairly in that during the hearing of the matter or the evidence, some of them exhibited open prejudice towards certain of the Applicants such that there was an obvious failure of justice as manifested in the findings. To this extent the proceedings ended up not being fair in so far as they did not observe the rules of natural justice and also by being contrary to the provisions of Section 33 of the Constitution of the Kingdom of Swaziland. These facts are averred at paragraph 11.7.6 (a), (b) and (c) of the Founding affidavit in the initial application.

[12] The above therefore constitutes the general facts of the matter which led the Minister to invoke the provisions of the Urban Government Act as cited earlier on in this judgment.

[13] The crux of the whole matter is that the Minister wanted to implement the recommendations of the Commission of Enquiry whilst the commissioners were of the view that the said findings should be reviewed by the High Court and did not want to implement its recommendations pending the judgment of the court as aforesaid.

The preliminary objections.

[14] The Respondents oppose this application and an Answering affidavit of the 2nd Respondents has been filed with annexures. In the said affidavit three points *in limine* are raised as well as the defence on the merits of the application. The points *in limine* raised read *ippsisima verba* as follows:

> 5. Prayer 2 of the Notice of Motion in the main application seeks to interdict me from exercising the powers conferred upon by Section 107 (4) of Act 8/1969 ("the Act"). I have already exercised that power and therefore that prayer is now academic or moot. Prayer 4 of the main application is also moot.
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> 6. I am advised by the Attorney general and verily believe that courts do not

adjudicate moot issues.

7. The apprehension that I would dissolve the 1st Applicant in the application is the sole basis on which the Applicants approached the court on an urgent basis. In light of my invocation of the power conferred by Section 107 (4) of the Act, the urgency has fallen away. Prayer 3 of Notice of Motion should be dealt with in accordance with the ordinary time limits prescribed by the Rules of this court.

With regard to the interlocutory application, prayers 2 and 3 of that application cannot be implemented without affecting the rights of the interim Councilors for the Municipal Council of Mbabane.

In the exercise of the powers conferred upon me by Section 110 of the Act, I have appointed interim Councilors for the Municipal Council of Mbabane. A copy of the legal notice appointing the interim Councilors is attached hereto and marked "MD1". The new Councilors have a direct and substantial interest in the relief sought in the interlocutory application, they should have been cited and joined in the application.

[15] On the merits of the case a number of pertinent averments are made in opposition and in paragraph 28 thereof the general stance by the Minister is that:

> "I admit that I was aware that Applicants wished to seek redress from the courts but I deny that Council was dissolved with the object of achieving an ulterior purpose. I submit that a party's intention to seek redress from the courts does not fetter a decision maker's power to invoke his or her statutory power".

[16] In paragraph 29 thereof the following is stated:

> "Council was dissolved after it failed to comply with the terms of an order I made under Section 107 (3) (a) and subsequent to it being given an opportunity to give reasons for their non-compliance".

[17] The Applicants then filed a Replying affidavit to the Respondents Answering affidavit in terms of the Rules of court.

[18] The issues that I should first address are the points *in limine* by the Respondents and thereafter proceed on the merits, if I dismiss the points *in limine.* I shall proceed to address these points *ad seriatim* as follows:

(i) Urgency

[19] It is contended by the Respondents in this regard that the Applicant's basis for approaching the court on an urgent basis in the main application was their apprehension that the Minister would invoke his powers under Section 107 (4) of the Act. In light of the fact that the Minister has already acted, the urgency has fallen away.

[20] The respondents contend that there are only two live controversies for the court to decide:

(i) Whether the dissolution of the council violated the Applicant's constitutional right to administer justice, and

(ii) Whether the findings and recommendations of the commission of enquiry into the operations of the Municipal Council of Mbabane should be reviewed, corrected and set aside.

[21] That *in casu* there are no specific allegations of fact in Sikhatsi Dlamini's affidavits which demonstrate that irreparable loss or irreversible deterioration to the Applicants' prejudice, if the two live issue alluded to above are ventilated at a hearing in due course. In this regard the court was referred to the Full Bench decision of this court in the matter of *Swaziland Federation of Trade Unions and 3 others vs Chairman of the Constitutional Review Commission and 7 others - Case No. 3367/2004.*

[21] The Applicants on the other hand have submitted that they have proved urgency as required by the Rules of this court. In any event it is argued that the urgency has fallen away because this court has already invoked its powers and in the Applicants understanding the matter is now enrolled as one of urgency and as such the point is without merit.

[22] Having considered the pros and cons of the arguments of the parties I have come to the considered view that the point about urgency has no merit in view of the fact that the case in now enrolled as one of urgency. The facts of the matter are clear that the matter is urgent in that the Applicants have been removed from being Councilors and in their stead other Councilors have been put in place. The Applicants' contend that the Minister acted unlawfully by riding roughshod on their rights as Councilors of the Mbabane City Council. It is this fact in my view that gives credence to the Applicants claims that the matter is urgent. For this reason I have come to the considered view that urgency has been proved on the facts of the matter. Therefore the point of law *in limine* in this regard is dismissed.

(ii) Non joinder.

[23] The argument in this regard is that the Minister acting in terms of Section 110 of the Act has appointed interim Councilors for the Municipal Council of Mbabane *(per* Legal Notice No. 71/2007). The relief sought by the Applicants cannot be effected without affecting the right of the Interim Councilors to remain councilors. The Interim Councilors have a direct and substantial interest in this application and they ought to have been cited. The court was referred to the High Court case in the matter of *Bhutana Dlamini & Another vs Minister of Housing and Urban Development & Another Case No. 27/2007 (per* MabuzaJ). The court was also referred to the leading case of *Amalgamated Engineering Union vs Minister of Labour 1949 (3) S.A. 637 (A).* The Respondents contend that on this ground alone the Applicants application falls to be dismissed with costs.

[24] It was argued for the Applicants that the *ratio* in the *Amalgamated Engineering* case *supra* relied upon by the Respondents is ill-founded. The *ratio* of this case is that if a third party has, or may have, a direct and substantial interest in any order the court might make in proceedings if such an order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined. The question that arises is whether the rule in the *Amalgamated Engineering* case would preclude the court in the present case from granting the relief sought.

According to the Applicants the circumstances of this case are such that there would be no legal justification and the interest of justice would not be advanced if the Applicants are deprived of relief simply because the Interim Councilors have not been joined as a party in these proceedings.

[25] The Applicants contend that *in casu* they were unaware that there were "Interim Councilors" when the proceedings were launched. The Applicants only became aware that the Council had been dissolved when their attorney served the application for review. It was only then that this application was prepared and launched on an urgent basis and at that time they did not know the identity of the Interim Councilors. Accordingly, it would not have been possible to serve the application on the Interim Councilors and there was no legal reason at the time to join them in the proceedings.

[26] Having considered the arguments of the parties, it is my considered view that the Interim Councilors ought to be joined in this suit. It may well be that they are products of an illegal act but the fact remains that before the court pronounces on the merits of the case they cannot be said to be illegally in office. *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *165* state that **where a party has a direct and substantial interest he is then a necessary party and should by operation of the law be joined in the proceedings unless he expressly waives his right to join.** For this reason I would not dismiss the matter on this point of law *in limine* but would order that the Interim Councilors be joined in this application. That they are given a period of 10 (ten) days to file their opposing affidavits and on the 16th May 2008 thematter to appear before court at 9.30am for arguments. Thereafter the court will pronounce its judgment on the merits of the case.

S.B. MAPHALALA

JUDGE