



**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

CIVIL CASE NO. 1872/06

In the matter between:

**MPD MARKETING & SUPPLIES**

**(PTY) LIMITED**

**1<sup>ST</sup>**

**APPLICANT**

**MPHENI DLOMO**

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

**APPLICANT**

And

**TREAVOR SEAN WHITE N.O.** **1<sup>ST</sup>** **RESPONDENT**

**THE PRIME MINISTER OF SWAZILAND** **2<sup>ND</sup>**  
**RESPONDENT**

**ATTORNEY-GENERAL OF SWAZILAND** **3<sup>RD</sup>**  
**RESPONDENT**

**CORAM**

**: Q.M. MABUZA -J**

**FOR APPLICANTS**

**: ADV. WISE INSTRUCTED BY**  
**MR. MOTSA OF ROBINSON**

**BERTRAM**

**FOR RESPONDENTS**

**: MR. JOHN MAGAGULA -**  
**ATTORNEY GENERAL'S OFFICE**

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**JUDGEMENT 28/3/08**

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**[1] This application was brought as a matter of urgency and first came before court on Monday 29<sup>th</sup> May 2006. The Applicants sought inter alia the following orders:**

- (a) **Interdicting and staying all proceedings of the “Commission of enquiry to investigate the extent of the loss suffered by government as well as the interest accrued to the amount of E9,089,999.00 which was paid out before delivery into the bank account of MPD Marketing and Supplies with Standard Bank of Swaziland” which was established under Legal Notice 65 of 2006 by the Prime Minister of Swaziland, pending the**

final determination the legal proceedings contemplated in 2 below.

(b) Directing that the first and second applicant institute proceedings out of this Court on or before 1 August 2006 in which they claim an order that Legal Notice 65 of 2006 be reviewed and set aside, and/or for similar ancillary relief failing which the order under 1 hereof shall lapse, provided that this Court may on good cause shown extend the time for the institution of such proceedings.

(c) Ordering that the costs of this application including the certified costs of counsel be paid by the first, second and third respondents in their representative capacities jointly and severally on the scale as between attorney and own client.

**[2] The 2<sup>nd</sup> Respondent who is the Prime Minister of Swaziland appointed the 1<sup>st</sup> Respondent Mr. Trevor Sean White (chairman) and another Peter Anderson (member secretary) onto a Commission of Enquiry which he set up in terms of Legal Notice no. 65/2006. For convenience I shall refer to this Commission as the “White Commission”. The legal notice was published on the 28<sup>th</sup> April 2006.**

**[3] The “White Commission” was a sequel to the Magagula Commission which had been instituted by the 1<sup>st</sup> Respondent to investigate the circumstances surrounding the drilling rig tender which tender had been awarded to the Applicant(s).**

**[4] The functions of the Commission are set out in Legal Notice no. 65/2006 as follows:**

**“3.1(1) A forensic investigation must be undertaken to establish:**

**(a) the precise extent of the loss suffered by Government as well as the interest that accrued to the amount of E9,089,99.00 which was paid out before delivery into the bank account of MPD Marketing and Supplies with Standard Bank - Swaziland.**

**(b) Whether or not questionable bank payments and deposits in the banking and financial affairs of the tenderers and Government officials within Geology, Treasury Tender Board and Central Tender Board exist.**

[5] Mr. Vetten for the Respondents has argued that the issue of costs turns on whether the requirements for an interim interdict have been met and concludes that they have not been met and the Respondents should be awarded their costs.

**[6] It is trite law that the requirements for an interdict are that the Applicant should establish a prima facie right, a reasonable apprehension of**

**irreparable harm, the absence of an alternative remedy; and a balance of convenience in favour of the Applicant. If any one of the requirements are not met despite all the others being met, the interdict cannot be granted.**

**[7] The Applicants have raised four objections to the White Commission in order to establish a prima facie right namely:**

- That the legal notice is void for vagueness.

That the legal notice is ultra vires the powers of the Prime Minister.

That the Commission of Enquiry procedure envisaged constitutes a fundamental breach of the principles of natural justice; and

- **That the proposed commission infringes fundamental rights in the constitution of Swaziland.**

**[8] I have no intention of going into the details of the issues enumerated in 7. hereinabove. I am satisfied that the Applicants have established a prima facie right in that legal notice no. 65 of 2006 is void for vagueness. I shall discuss this aspect in full later on in this judgment.**

**[9] In respect of a reasonable apprehension of harm: The Applicants have submitted that the Commission had insisted on going ahead and had issued subpoenas. They had identified certain accounts that they wished to go through and had subpoenaed a bank official to bring the bank accounts. Mr. Vetten has argued that the issue of the accounts and bank official are new submissions as they were not raised on the papers before me. This is incorrect, they appear on the subpoenas which are attached to the papers hereto.**

**[10] In respect of there being no other remedy: Mr Vetten has submitted that the Applicants could have had their subpoenas set aside and not to halt the entire commission. The Applicants have responded to this submission by stating that even if they had set aside subpoenas relating to them other witnesses would have been called and the Applicants' rights would have been invaded. I agree with the Applicants' submission. Furthermore the idea of a court**

order came from the 3<sup>rd</sup> Respondent when all prior negotiations with the 1<sup>st</sup> Respondent to postpone the hearing had failed.

[11] In respect of the balance of convenience being in favour of the Applicant: It is the Applicants in my view who would suffer prejudice if the Commission is not interdicted and the concern they raised in the correspondence to the Respondents are not dealt with. There is no prejudice to the Government if the Commission is interdicted at this stage.

[12] I am satisfied therefor that the requirements for an interdict have been met and that granting of the interim order on the 26/6/07 was justified.

[13] Turning to the second prayer of the application the Applicants have raised certain concerns in respect of the contents of Legal Notice No. 65/2006. They raised these with the 1<sup>st</sup> Respondent who initially was accommodating



but after he had checked with the 3<sup>rd</sup> Respondent (Attorney General) the latter advised him to proceed with the enquiry unless there was a Court Order interdicting him from doing so.

The Secretary to Cabinet agreed with the 3<sup>rd</sup> Respondents' advice.

[14] The 1<sup>st</sup> Respondent thereafter advised the Applicants that he would continue with the enquiry on Tuesday 30<sup>th</sup> May 2006. Hence the present application. After hearing Counsel for the parties on the 29<sup>th</sup> May 2006, the Court granted an interim interdict and put the parties to terms and the matter was postponed to the 29<sup>th</sup> June 2006. On that day the matter was again postponed to 28<sup>th</sup> July 2006 whereupon it was again postponed to the 25<sup>th</sup> August 2006. It was postponed once more to the 13 October 2006. However on special arrangement between the parties, I was able to hear it on the 11/10/06

and 12/10/06.

**[15] On the 28<sup>th</sup> July 2006 the 2<sup>nd</sup> Respondent caused Legal Notice No. 121 of 2006 to be published in the Government Gazette. This notice purports to be published in terms of the Commission of Enquiry Act of 1963. It declares the Commission to consist of the same two people, namely, the 1<sup>st</sup> Respondent hereto and Peter Anderson. There are points of similarity between it and legal notice No. 65 of 2006. This notice did not revoke notice no. 65/2006 but Mr. Vetten submitted that the 2<sup>nd</sup> Respondent would no longer continue with the 1<sup>st</sup> Commission of enquiry which had been set out under legal notice no. 65/2006.**

**[16] The functions of the Commission set out in legal notice no. 121/2006 are as follows:**

**Legal Notice**

**“3. (1) The Commission shall carry out a**

**forensic**

**investigation to establish -**

- (a) **the extent of the loss suffered by Government as a result of the payment of the sum of E9 089 999.00 into the bank account of MPD Marketing and Suppliers (Pty) Ltd with Standard Bank Swaziland before delivery in terms of Tender No. 177/2004/5;**
- (b) **the interest, if any, which accrued on the said sum of E9 089 999.00 between payment and delivery under paragraph (a);**
- (c) **whether any public officer within Geology Department or any member of the Treasury Tender Board or the Central Tender Board privately benefited from the award of Tender No. 177/2004 - 5 as may be reflected in any bank deposits of the officer or member.”**

**[17] Due to the publication of legal notice No. 121/2006 the institution of proceedings contemplated in prayer 2 hereinabove did not take place and the parties submitted arguments on the papers that had already been filed. These were in my view sufficient to support the arguments that were advanced.**

**[18] Furthermore because of the publication of legal notice No. 121/2006 it was agreed by the parties that legal notice No. 65/2006 become redundant. It was further agreed that the interim interdict be discharged. The only issue that remained would be that of costs. The parties presented submissions in respect thereof.**

**[19] The Applicant[s] engaged the 1<sup>st</sup> Respondent with regard to their concerns in respect of legal notice no. 65 of 2006. This is borne out by correspondence written between 17 May to 22 May 2006 and addressed to the 1<sup>st</sup> Respondent. The Applicants requested a postponement of the hearing of the Commission to enable them to bring the application. Mr. White as earlier mentioned was reasonable but not the Government whereupon Mr. White felt obliged to continue with the hearing and actually issued subpoenas.**

**[20] As I have already indicated earlier in paragraph 7 hereinabove the Applicant[s] challenged legal**

**notice no. 65 of 2006 on four grounds. I shall highlight the issues pertinent to the ground that it is void for vagueness.**

- **It lacked certainty for example “... the extent of the loss suffered by the Government ...”**

**This phrase appears in paragraph 1, 2, and 3 of the legal notice. There is nothing in the notice to indicate “which loss” has been suffered by the Government that is to be the subject of the inquiry. It was submitted further that in order for the Commissioners to carry out their mandate in terms of the legal notice, they have to be able to know precisely what the terms of their mandate is by reading the legal notice. They are not free to have regard to extraneous factors in order to decide what their mandate is. The formulation so the argument goes that is used in the notice assumes and presupposes that the Government has indeed suffered a loss and that such loss is quantifiable. Without the notice itself making clear what the loss is and what gave rise to the loss,**

**there is no basis for any such assumption, let alone that it can be quantified or that it can be quantified by members of the White commission. The term “the loss” is not defined or circumscribed in any way.**

**[21] The wording that appears in legal notice No. 121/2006 which was published on the 28<sup>th</sup> July 2006 remedies the above complaints and sets clear standards and clear limits on the scope of “the loss” to be investigated thus removing the ambiguity and vagueness.**

**[22] In paragraph 3 (1) (b) of legal notice no. 65 of 2006, the White commission is enjoined to conduct forensic investigation into “... questionable bank payments and deposits in the banking and financial affairs...” (emphasis added).**

**[23] The Applicants further argue that the word “questionable” is wide, ambiguous and vague and would lead in the Commission poking its nose into matters which are of no legitimate**

**concern to the Government or any other person.**  
**The new notice no. 121 of 2006 has removed this**  
**complaint completely.**

**[24] In my view the second notice namely notice no.**  
**121 of 2006 was to remedy the deficiencies of**  
**the first notice. This is evident from the**  
**wording therein as well as the date of the**  
**publication which came conveniently after the**  
**application had been launched. I am satisfied**  
**that the complaint by the Applicants was**  
**justified and they were in my view entitled to the**  
**order sought and obtained on the 29/5/06.**

**[25] In the premises the Respondents are ordered to pay**  
**costs on the ordinary scale including the certified costs**  
**of Counsel in terms of Rule 68 (1).**

**Q.M. MABUZA -J**