IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 3529/2008

In the matter between:

SIMET HOLDINGS (PTY) LIMITED APPLICANT

VS

SWAZILAND WATER SERVICES

CORPORATION RESPONDENT

CORAM MAMBAJ

FOR APPLICANT FOR MR B. SIMELANE

RESPONDENT MS X. SHABANGU

JUDGEMENT 12th
FEBRUARY, 2009

[1] The Applicant company is the owner and occupier of the property referred to as Plot 1286, Madonsa Township in Manzini. At all times material herein the property was being supplied with tap water by the Respondent.

[2] It is common cause between the parties that some time before the 29th July, 2008, the pipe supplying water to the Applicant's property was either deliberately interfered or tempered with or accidentally

damaged and the water started spilling onto the property and other neighbouring properties in the area. The damage to the water pipe occurred on a section of the pipe that is on the Applicants' property but before the meter that is installed on the pipe to record the water consumption or usage on the property. This, therefore, meant that the water that was flowing out of the pipe onto the ground and adjacent property was not being recorded or metered as having been consumed on the Applicant's property.

[3] On the 29th July, 2008, Mr Ben Simelane, a director of the Applicant informed the Respondent's servants about the said damage to the pipe and the nuisance being caused thereby. The Respondent was requested to go and fix the damaged pipe. The Respondent attended the problem on the following day.

[4] On getting to the property the Respondent's servants were of the view that the damage to the water pipe had "been caused by the Applicant's truck which had collided onto the water meter and destroyed it, and... the Applicant's proprietors and or personnel who were at such location continued to utilize the water without any means being done by them to minimize the further loss of water." The Respondent avers that because of the above facts and conclusion, the respondent "...was empowered and justified in taking the said meter and a one meter pipe belonging to the respondent ...and to stop the water supply, which had been used unlawfully." Respondent has not denied having also removed a tap from the property.

[5] It is common cause further that the Applicant objected to the taking of the above items by the respondent before such items were actually removed from the premises. The Respondent was, however, not persuaded and this has led to this spoliation application.

[6] As stated above, Respondent admits having taken the items in question and avers that it was justified in law in acting as it did. The Respondent has

based its defence on the provisions of section 18(i) of the Water Services Corporation Act - of 1992. This section provides that;

> "The Corporation may discontinue its services to a consumer if the consumer; ...
> (g) interferes or attempts to interfere with the Corporation's services, apparatus or seals;
> (h) fraudulently abstracts, wastes, diverts or causes to be abstracted, wasted or diverted, or consumes or uses or causes to be consumed or used water or other services supplied by the Corporation.
> (i) In the case of water supplied by the Corporation, the amount of which is not ascertained by meter, uses the water in a way different from, or in an amount greater than, that for which the consumer has contracted to pay."

[7] The Applicant denies having caused the damage to the pipe in question and also denies having used the water abstracted without being metered as alleged by the Respondent.

[8] That the tap, meter and one meter-long pipe were on the property when removed by the Respondent is beyond doubt. That these were, by virtue of being on the property and utilized exclusively by the Applicant, were in the possession of the Applicant, admits of no doubt too, in my judgement. So too is the fact that such possession was ensconced and peaceful or undisturbed. The issue for decision therefore is whether or not the removal of these items from the site was lawful or illicit; and in particular authorized by section 18 (i) of the above cited Act.

[9] Section 18(1) of the Act authorizes and or permits the Respondent to discontinue its services to a consumer if certain facts or circumstances exist or are present. These jurisdictional facts all pertain to unlawful use or consumption of the water or other services provided by the Respondent or relate to damage or interference with the apparatus or seals forming the infrastructure or equipment of the respondent. The question therefore is, in enacting these provisions, did Parliament intend that the Respondent should be its own police or investigator, be the prosecutor, the judge and jury and executioner in its own cause whenever it came to the conclusion that its services or equipment had been unlawfully interfered with by one of

its customers? I do not think so. I can find no indication in the Act that would justify this conclusion.

[10] An issue similar or akin to the present arose in the case of **AFRICAN BILLBOARD ADVERTISING (PTY) LTD v NORTH AND SOUTH CENTRAL LOCAL COUNCILS, DURBAN, 2004 (3) SA 223.**
In this case the Applicant had erected or put-up certain advertising signs on property within the jurisdiction of the Durban City Council. Acting in terms of the building by-laws, the Respondents objected to these signs and when the Applicant refused to remove them, the Respondents did so without a court order, contending that the bylaws permitted them to do so. The relevant section of the by-laws

relied upon by the Respondents provided that:

> "(3) If a person to whom notice has been given in terms of ss (2) fails to comply with a direction contained in that notice within the period therein specified, the city engineer may, at any time after the expiration of that period, through the agency of any person authorized thereto by him, enter upon the land upon which the advertisement or sign to which the notice relates, is being displayed or has been erected and remove the advertisement or sign or effect the alterations prescribed in the notice."

[11] After considering or reviewing the case law and the applicable legal principles on such matters, the court referred with approval to what was said by Williamson J in the case of **Sithole v Native Resettlement Board 1959 (4) SA 115 (W) @ 117C-G** where the learned judge stated as follows:

> "The argument shortly for the Respondent is that that position, which is the normal position of persons entitled to possession of property, has been disturbed by the provisions of s 17(6). Of course, Parliament may, if it so deems fit, alter the ordinary principle of law that a person entitled to property is not entitled to enter upon it and take possession himself by force. The right so to act is one which obviously must be conferred in clear language; the clear principle of our law is that, ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of court being put into effect through the proper officers of the law such as the sheriff, deputy sheriff, messenger of the Magistrate's court or his deputies, reinforced if necessary, by the aid of the police or some such authority; in most

civilized countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not so, breaches of the peace, for instance, would be very common. It is clear, therefore, that if you want to enforce a right you must get the officers of the law to assist you in the attainment of your rights.

The principle applies equally to the rights of public bodies such as municipalities or provincial councils or any similar bodies, and even to state departments. Individual members of a state department normally cannot, in the interest of their department, take the law into their own hands and enforce state rights without the state having made use of the assistance of its judicial department in order to help it to acquire possession of property to which the state may be entitled."

This decision was approved by the Appellate Division in the case of **George Municipality v Vena and Another, 1989 (2) SA 203 (A),** where at 271 the court had this to say:

"The right of any person in possession property, whether movable or immovable, not to be disturbed in his possession except by legal process, is one recognized by most civilized systems of law. In America, for example, it is guaranteed by the Fourteenth Amendment to the Constitution. It is also a fundamental principle of our law. This ordinary principle of law may, however, be altered by Parliament, which may confer a right to act without due process of law. Such a right is in the words of Williamson J (as he then was) '...one which obviously must be conferred in clear language

[12] In the **African Billboard case (supra)** in allowing the appeal, the learned Judge stated as follows:

"I am not persuaded that the framers of the by-laws intended that this should occur without a Court order. It was a simple matter to say that no Court order would be required. Our Courts have in the past applied rules against self-help strictly. For example, a lease may provide that upon cancellation the landlord is entitled to regain possession of the premises. We know that this cannot take place unless the landlord goes to Court and obtains a Court order. In the case of notarial bonds one finds provisions which entitle the creditor to take possession of pledged movables upon a breach by the debtor. Here again, this cannot occur without a Court order. In short the policy of our law has always been to set its face against any form of self-help. In the instant case the city engineer formed a judgement in regard to the legality of the signs and he himself executed that judgement. Mr Chadwick argues that the 14 day period afforded to the offending party to remove the sign cures the problem. He submits that such a party, if he

disputed the City engineer's contentions, could move the court for an appropriate declaratory order."

(The ex tempore judgement was delivered in open court immediately after submissions on the 14th November, 2008.)

MAMBA J

[13] The nature, import or purport or the substance of the powers relied upon by and given to the Respondent under section 18(1) of the Act are the same in the **Municipality cases** referred to above. The jurisdiction of the court is not ousted or waived under this section. In restrictively interpreting enabling or empowering provisions such as in the present case, the person claiming such powers is expected to do that which he is empowered to do and nothing more. In casu, the Respondent did not just discontinue the supply of water to the property as envisaged in the Act, but went further and removed the items referred to above. The Respondent has not stated that the said removal was the only reasonable way of discontinuing the supply of water to the premises in the circumstances. The Respondent was not entitled to resort to self-help and the application must therefore succeed with costs and it is so ordered.