



## **THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 3413/10

In the matter between:

**VELI MAMBA**

**Applicant**

**And**

**SWAZILAND WATER SERVICES CORPORATION**

**Respondent**

**Neutral citation:** Veli Mamba v Swaziland Water Services Corporation 3413/10  
[2012] SZHC 72 (17<sup>th</sup> April 2012)

**CORAM:** M. Dlamini

**Heard:** 5<sup>th</sup> April 2012

**Delivered:** 17<sup>th</sup> April 2012

**For the Applicant:** M. Manana

**For the Respondent:** X. Shabangu

**Urgent application – dispute of fact – what constitute dispute of fact**

## Summary

This is an application brought in terms of Rule 6 (25) under a certificate of urgency. The applicant alleged that respondent, a service provider of mainly water, dug trenches next to pipes leading to his residence thereby damaging the same.

[1] As a result the damaged pipes, he suffered water leakages which impacted on his water bill. In order to mitigate his loses he had to switch off the water supply and therefore was without water.

[2] It is not clear what happened in court on the date of hearing. However, subsequently the matter was referred to the Registrar for allocation of a date. During submission, it was contended that applicant was still without water.

[3] This court was called upon to determine on papers whether there was any dispute of fact. Respondent submitted that should the court find that there was a dispute of fact, it should dismiss the application with costs as it was incumbent upon the applicant to have reasonably foreseen such and therefore bring his case by way of action proceedings.

[4] *The locus classicus* case on the form of procedure to be adopted by a litigant who wishes to lodge a case in court is **Room Hire Co. (Pty) Ltd v Jeep Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T). Murray A. J. P.** held:

*“ .....a person claiming relief acts at his peril in proceeding by motion, and not adopting the normal course of instituting action: he cannot by electing to proceed by motion deprive his opponent of a number of procedural advantages instanced in the judgment referred to, viz. prematurely the right to plead without disclosing his evidence, the right to make tactical denials in order to force his opponent into the witness box, the right to raise alternative defences of possible inconsistency”.*

[5] In **R. Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd 1948 (2) 626 at page 631 Dowling J.** crystalised the issues when he decided:

*“The question of balance of probabilities ought not to arise in any motion proceedings where the form of procedure ordinarily appropriate is *rauw actie*. The existence or non-existence of a bona fide dispute on a material fact is the only test to be applied and a litigant seeking to force a decision on motion proceedings in such cases does so at his peril”.*

[6] The cases cited herein demonstrate clearly that the court should examine the evidence presented to ascertain whether there is a genuine or material dispute of fact.

[7] **Murray, A.J.P. in Room Hire supra** at page 1165 articulates the guidelines to the enquiry as to the existence or otherwise of a material dispute of fact as follows:

*“ .....a denial of applicant’s material averments cannot be regarded as sufficient to defeat applicant’s right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent’s affidavit must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.*

*(b) Once the practice of deciding matters on motion is accepted as fully established, any tactical advantage which respondent might have had in the event of the institution of a trial action .....must perforce yield to the applicant’s recognised right to the mere expeditious and less expensive method of enforcing a claim by motion”.*

[8] **Murray A. J. P.** however ends with this *ratio decendi*:

*“except in interlocutory matters, it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits”.* Page 1155

[9] As already highlighted that the matter before this court came by way of urgency. In the certificate of urgent, counsel states as the ground for urgency:

*“... this matter is urgent by virtue of the fact that the applicant has been without water for a number of days yet this has been occasioned by the negligence of respondent’s officers who have refused to repair the pipe they damaged and applicant stands to suffer irreparable harm were the matter to take its normal course.*

[10] I was not asked to adjudicate on the question of urgency as by the time the matter came before me, both counsel conceded that the urgency had been overtaken by events. I was informed from the bar that the applicant had purchased a water tank and was using it to store the water.

[11] In the notice of motion, the applicant did not pray for a rule nisi. He concluded his prayers as follows:

- “a) That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis;***
- b) That an order be and is hereby issued directing and compelling the respondent to repair the damaged water pipe at applicant’s homestead;***
- c) That an order be and is hereby issued directing and compelling the respondent to fill up the trenches dug at the applicant’s homestead;***
- d) Costs of application at a punitive scale;***
- e) Further and / or alternative relief”.***

[12] Following that there was no interlocutory order prayed for, I now enquire whether the affidavit before me raise any real issue on the material facts.

Applicant avers in his founding affidavit:

- “5. *On or about the 7<sup>th</sup> day of September 2010, officers of the respondent based at Hlathikhulu and Nhlango proceeded to my homestead where they dug trenches next to their water pipes to breach the meter.*
6. *The officers of the respondent proceeded even after they had passed the meter to dig the trenches thereby damaging the pipe leading to my homestead from the meter.*
7. *After finishing their investigations, the respondent’s officers did not bother themselves filling up the trenches they had dug and also repairing the damaged pipe leading to my homestead.*
8. *Since the damage to the pipe occurred, the applicant has since been without water as I had to switch off the supply due to the leaking pipe which would have resulted with me having to pay for water I have not used.*
9. *I have been to the officers of the respondent at Hlathikhulu and Nhlango to seek assistance to no avail. Officers at Nhlango allege that it is not their duty to repair the damaged pipes as it is not them who dug the trenches yet those of Hlathikhulu concede that they are the ones in the company of those from Nhlango who dug the trenches”.*

[13] In deprecation, respondent avers at pages 16 – 20:

6.

**“AD MERITS**

**AD PARAGRAPH 1-4**

*Save to deny that the contents of the applicant’s founding affidavit are true and correct, the rest of the contents herein are admitted*

7.

**AD PARAGRAPH 5**

*Contents herein are denied and applicant is put to strict proof thereof.*

7.1 *Respondent denies proceeding to applicant’s homestead and digging trenches on the 7<sup>th</sup> September 2010.*

7.2 *To give this Honourable Court a clear picture regarding the matter I would like to respond as follows to these paragraphs:*

7.3 *It is averred that the respondent is in the process of conducting an illegal connection survey in the Shiselweni region.*

7.4 *After having received numerous information from the community members of Mahlshaneni where applicant resides, that the applicant might be tempering with the respondent’s water*

*connection and supply, the respondent carried out an in-depth investigation of the matter.*

7.5 *The community members had indicated to the respondent's regional offices at Shiselweni that the applicant was selling water to the other members of the community and was using it to irrigate his fields.*

7.6 *Upon receiving the information the respondent through my office closely monitored the applicant's water usage and indeed reports of the community members were confirmed by our investigations.*

7.7 *Respondent through my office further confirmed the excessive use of the respondent's water with the applicant himself. He confirmed that he was selling the respondent's water to the community and further irrigates his fields.*

7.8 *Upon further analysis of the water consumption rate of the applicant, the respondent confirmed its suspicions about a possible illegal connection.*

7.9 *Therefore on the 1<sup>st</sup> September 2010 I deployed personnel to investigate the matter at applicant's homestead and the survey was completed on the 2<sup>nd</sup> September 2010.*

7.10 *I aver that there is no other way an investigation for an illegal connection could have been made without digging alongside the*



*respondent's pipes to ascertain whether they had been tempered with.*

8.

**AD PARAGRAPH 6-7**

*The contents herein are denied and applicant is put to strict proof thereof.*

8.1 *I state that permission to dig was granted to respondent by a certain lady whose name is unknown to me, whom we found at applicant's homestead and the applicant was not present at that time.*

8.2 *We dug trenches alongside the underground water pipes to investigate further on any possible illegal connection and soon thereafter the applicant arrived and started shouting and threatening us hence we stopped the digging.*

8.3 *We explained, however, to the applicant that permission has been sought from the lady who was at applicant's house to dig and that it was respondent's right to investigate where it is suspected that an illegal connection has occurred and he then left his homestead.*

8.4 *I aver that we therefore covered the trenches and there were no leaks along the pipe line.*

8.5 *Applicant came back and found employees still on site and he did not complain about leaking pipes nor trenches that have been left uncovered.*

8.6 *It is averred that the applicant was stripping the meter to connect his pipe directly from the meter pipe as it was leaking where the respondent's pipes connect with the meter. Respondent removed the pipes leading to the meter and upon doing that, found visible signs that the meter was regularly stripped off.*

8.7 *We therefore reconnected the meter directly to the gate valve, as this would prevent any stripping of the meter for illegal connections. The above Honourable court should also be notified that any sort of tempering with the pipe after respondent had reconnected the meter would have likely led to a leakage of the pipes.*

9.

**AD PARAGRAPH 8**

*Save to state that the damage on applicant's pipe has not been caused by the negligence of respondent's employees, the contents herein are not in issue.*

10.

**AD PARAGRAPH 9**

*The contents herein are denied and applicant is put to strict proof thereof.*

*10.1 I state that we attended to applicant's complaint and one of respondent's employees, Petros Lokotfwako, who had been part of the investigation at applicant's homestead, found that there had been some tempering with the pipeline after the conclusion of the survey. I aver that we had left the pipelines and meter intact save for providing more preventative measures against illegal connections on the meter.*

*10.2 I state that it was not the Respondent's employees who caused the leakage on respondent's pipeline and therefore the respondent cannot be held accountable for acts of other who have not been mandated by the respondent to act on its behalf. The pipeline the applicant alleges to be leaking has been tempered with after it was re-connected by the respondent during the illegal connection investigation at applicant's homestead.*

*11.*

**AD PARAGRAPH 10**

*The contents herein are denied and applicant is put to strict proof thereof.*

*11.1 I aver that the respondent's employees were not negligent as they never damaged applicant's pipe. Contents of paragraph 10.2 above are herein reiterated.*

11.2 *I state that any harm that may be or is being suffered by applicant will be and / or is self-created in that it is the applicant who has elected to deprive himself of water supply. It is averred that there are real visible signs that the meter has been tempered with again.*

11.3 *Therefore the court should not come to the assistance of an applicant who approaches it with unclean hands. Granting of the order sought by the applicant will amount to condoning unlawful behavior and render the respondent's efforts to stop illegal connections meaningless.*

11.4 *The respondent is guided by the Water Services Corporation Act in its operation and in particular dealing with the tempering of meters.*

11.5 *All the remedies that are afforded to parties in such matters have not been exhausted.*

*Full and further arguments will be advanced at the hearing.*

12.

**AD PARAGRAPH 11**

*The contents of this paragraph are denied and applicant is put to strict proof thereof.*

12.1 *It is averred that the matter should have been heard using the normal time limits and applicant would not have suffered any prejudice.*

12.2 *In any event the applicant has not exhausted all available avenues to try and remedy the matter. In his paper he has not stated who he approached at respondent's office to try and address the issue of the damaged pipe.*

[14] I now consider whether the applicant ought to have foreseen that respondent would raise issues.

[15] It is common cause that respondent dug the trenches as averred by applicant. Respondent justifies this by stating that it was carrying investigations after receiving reports and verifying the same from applicant's consumption rate that there was illegal use of water perpetrated by applicant. It is not in issue that applicant reported the leakage.

[16] Applicant avers that having reported the leakage, respondent's employees informed him that it was not their responsibility to attend to it. In answering affidavit, respondent does not aver that having gone to the scene to attend to the complaint by applicant, they then advised him (complainant) that they were not responsible for the leakage. In the light of the absence of such contention, I do not see how it can be held that applicant ought to have

reasonably foreseen that respondent would raise a triable issue. I therefore hold that it was not irregular for applicant to come by way of motion proceeding more so when the matter was for all intent and purpose urgent.

[17] I now turn to consider whether there is any material dispute of fact on the papers before me.

[18] Applicant avers at pages 7 and 8 of the book of pleadings:.

*“7. After finishing their investigations, the respondent’s officers did not bother themselves filling up the trenches they had dug and also repairing the damaged pipe leading to my homestead.*

*9. I have been to the offices of the respondent at Hlathikhulu and Nhlango to seek assistance to no avail. Officers at Nhlango allege that it is not their duty to repair the damaged pipe as it is not them who dug the trenches yet those at Hlathikhulu concede that they are the ones in the company of those from Nhlango who dug the trenches”.*

[19] On the other hand, respondent contends at page 18

*“8.4 I aver that we therefore covered the trenches and there were no leaks along the pipe line.*

*8.5 Applicant came back and found employees still on site and he did not complain about leaking pipes nor trenches that have been left uncovered.*

8.7 *We therefore reconnected the meter directly to the gate valve, as this would prevent any stripping of the meter for illegal connections. The above Honourable court should also be notified that any sort of tempering with the pipe after respondent had reconnected the meter would have likely led to a leakage of the pipes.*

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10.1 *I state that we attended to applicant's complaint and one of respondent's employees, Petros Lokotfwako, who had been part of the investigation at applicant's homestead, found that there had been some tempering with the pipeline after the conclusion of the survey. I aver that we had left the pipelines and meter intact save for providing more preventative measures against illegal connections on the meter.*

10.2 *I state that it was not the Respondent's employees who caused the leakage on respondent's pipeline and therefore the respondent cannot be held accountable for acts of other who have not been mandated by the respondent to act on its behalf. The pipeline the applicant alleges to be leaking has been tempered with after it was re-connected by the respondent during the illegal connection investigation at applicant's homestead.*

11.1 *I aver that the respondent's employees were not negligent as they never damaged applicant's pipe. Contents of paragraph 10.2 above are herein reiterated.*

11.2 *I state that any harm that may be or is being suffered by applicant will be and / or is self-created in that it is the applicant who has elected to deprive himself of water supply. It is averred that there are real visible signs that the meter has been tempered with again”.*

[20] It is clear from the above that the respondent vehemently denies causing the leakage. Respondent submits that if there is any leakage, it should not be attributed to it.

[21] There is further the replying affidavit which demonstrates clearly that there are serious disputes of facts in the matter as applicant denies having fields, doing illegal connections or having a lady residing at his home where respondent alleges that he secured permission to dig the trenches.

[22] On the foregoing I conclude that there are material disputes of facts which justify for *viva voce* evidence. Leave to subpoena witnesses is accordingly granted to both parties.

[23] However, owing to the nature of the relief sought out by applicant, I am not inclined to order that the matter takes its normal cause nor shall I order dismissal of the application for the reason that applicant could not have



reasonably foreseen that respondent would raise material dispute of facts. In terms of Rule 6 (17), I order that the parties make discovery within 3 days from date of judgment and thereafter a pre-trial conference. The matter to be postponed to a nearer date where both counsel would be available for leading of oral evidence.

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**M. DLAMINI**  
**JUDGE**