



IN THE HIGH COURT OF SWAZILAND

RULING

REPORTABLE

Case No. 831/2013

In the matter between

MUNICIPAL COUNCIL OF MBABANE

Applicant

and

SABELO NGANONO MANYATSI

Respondent

Neutral citation: *Municipal Council of Mbabane v Sabelo Nganono Manyatsi* (831/2013) [2013] SZHC 120 (12 June 2013)

Coram: **Mamba J**

Heard: **11 June, 2013**

Delivered: 12 June, 2013

- [1] Administrative law – local authority – applicability of Urban Government Act 8 of 1969.
- [2] Administrative law – Urban Government Act – locus standi to sue or institute action for or on behalf of City Council – resides with Clerk to the Council as delegated per s125 of the Act. Such delegation, however, subject to approval by line Minister.
- [3] Administrative law – Urban Government – Municipality of Mbabane – City Engineer has no mandate or authority to institute legal proceedings on behalf of Municipality.

- [1] The applicant, the Municipal Council of Mbabane is a local authority established in accordance with the provisions of the Urban Government Act 8 of 1969 and has its principal place of business within the City of Mbabane at Mahlokohla Street. (The stand number is not indicated in the papers herein).
- [2] The respondent is Sabelo Nganono Manyatsi who is a Councillor for Ward 1 in the applicant and is the occupier of Plot 2620 situate at Mahwalala Zone 6 where he operates several businesses. It would seem that Zone 6 is also referred to as extension 1 and is within the jurisdiction of the applicant.
- [3] The application by the applicant has been filed by its Engineer, Muzikayise Masina, who states that by virtue of being the Town Engineer, he is the head of the Housing and Engineering department within the applicant and he is authorized to bring this application wherein the applicant seeks, *inter alia*, for the following orders on an urgent basis:
- ‘3. Pending the determination of eviction proceedings to be instituted by the applicant against the respondent, the respondent be and is hereby interdicted from:

- 3.1 Continuing to conduct business on the premises and / or containers on the property described as Plot 2620, Mahwalala, Zone 6, Mbabane.
- 3.2 From continuing with the construction of the illegal structure, currently being undertaken at Plot 2620, Mahwalala, Zone 6, Mbabane.
4. That the orders 3, 3.1 and 3.2 above operate with interim and immediate effect pending finalization of these proceedings.
5. That the Royal Swaziland Police be and are hereby ordered to give effect to this order by ensuring that the respondent does not conduct any business on the aforesaid property.
6. That the applicant be directed to issue the eviction action within seven (7) days of grant of this order.’

[4] Mr Masina avers that the mischief that the applicant seeks to stop is one within his area of jurisdiction and he is therefore the duly authorized person to bring this application on behalf of the applicant.

He avers that :

‘8.The applicant is also responsible for the enforcement of the provisions of the Building Act No. 34 of 1968 (the Building Act), within the Mbabane urban area. The Building Act comprises of the principal act as well as the regulations issued in terms of Section 37 of the Act. The applicant is responsible for ensuring that all temporary and permanent buildings within the Mbabane urban area, comply with the provisions of both the Act and the Regulations.

9. The applicant is also responsible for the enforcement of the Town Planning Act of 1961. In terms of Section 9 of the Town Planning Act, the applicant has the power to prepare and have published a town planning

scheme, in terms of which certain areas are designated for specific use. Relevant to the present matter, is that the applicant designates certain areas as public open spaces, for purposes of reserving these areas for public amenities such as parks and/or recreational facilities.

10. During or about the second half of 2011, the applicant became aware of a certain temporary structure in the form of a container that had been put up on a property described as Plot 2620, Mahwalala, Zone6. Upon investigation, the applicant learnt that the container (which was being used to conduct a business) belonged to the respondent. Upon learning of this fact, the applicant immediately contacted the respondent, seeking to have him remove the container and to stop carrying on business in the area.

11. During or about November 2012, the applicant formally notified the respondent that he was in contravention of the Building Act, its regulations as well as the Town Planning Act. The Applicant was given a formal notice advising him that he had contravened Section 5 (1) of the Building Act Regulations as well as Section 25 (1) of the same regulations. A copy of the notice is annexed hereto marked **“MD 1”**.

12. In terms of this notice, the respondent was advised as follows:

12.1 That he had contravened the provisions of the Building Act and its regulations by placing a temporary structure (container) and also by carrying on business on plot 2620, Mahwalala, Zone 6.

12.2 That Plot 2620, Mahwalala, Zone 6 is situate on a public open space. In terms of Section 5 (22) of the Town Planning Scheme of 1988, no person may utilize a public open space without permission of the applicant. In fact, the law regarding public open spaces is that they cannot be utilized for any activity other than what they are designated for.’

[5] It is also averred by Mr Masina that during the month of May this year, the respondent started constructing a new structure on the land in

question. This structure is being constructed of cement blocks and is in addition to the container that is housing the various businesses run by the respondent on the land in question. Neither the construction nor the businesses have been authorized by the applicant.

[6] Finally the applicant avers that the land in question has been zoned or reserved by the applicant as a public open park.

[7] In his opposition to this application, the respondent has raised about three preliminary points or points of law namely:

(a) That the matter is not urgent inasmuch as the dispute between the parties arose in 2011;

(b) That the City Engineer (Mr Masina) does not have the mandate or authority to bring this application on behalf of and for the applicant; and

(c) There are substantial disputes of fact herein that are irresolvable on the papers and that therefore this is not a matter that should have been brought to court by way of application. He states that Mr Masina knew about these disputes and should thus have foreseen that they would be raised in these proceedings. He bases his assertions, so he

says, on the correspondence that has been exchanged between the parties since the inception of this dispute.

(d) The respondent also raised the issue that the applicant's papers are fatally defective inasmuch as the purported affidavit by Mr Masina has not been sworn to before a Commissioner of Oaths. He observes that the name and designation of the alleged Commissioner of Oaths has not been indicated on the applicant's papers.

[8] The respondent has cited section 125 of the Act in support of his assertion that Mr Masina has no mandate or locus standi to bring this application on behalf of the Municipal Council. This section provides as follows:

'(1) Subject to the provisions of this section, anything required or authorized under this Act or any other law to be done by a local authority may be done by an officer of the local authority authorized in that behalf by resolution of the Council or Board either generally or specifically, and subject to such conditions as the Council or Board deem fit to impose.

(2) A resolution so authorizing an officer to act shall not have effect until approved by the Minister.'

[9] In his replying affidavit, Mr Masina defends and or justifies his authority to sue by averring that:

'8.1.1 First, the present application, relates to the enforcement of the

Building Act and Town Planning Act, and in terms of those legislation, I have the necessary authority to institute the proceedings. Legal argument will be advanced at the hearing of this matter.

8.1.2 Second, under the provisions of section 125 of the Urban Government Act, the Municipal Council of Mbabane caused to be issued a document entitled “**Municipal Council of Mbabane Delegation of Power**”. In terms of this delegation, the Council (comprising of elected Councillors) delegated certain powers to the applicant’s management, and this includes the power to institute legal proceedings. The authority to institute legal proceedings no longer vests with Council, but has been delegated. To avoid prolixity the delegation of powers of authority is not annexed to this application but will be filed from the bar as it is voluminous.’

[10] During argument or submissions, the court invited Counsel for the applicant to furnish to the respondent and to the court the delegation of authority that Mr Masina referred to above. This was done by Counsel.

[11] In terms of Annexure 3, which is undated, of the applicant’s Delegation of Powers document that was handed in by Counsel the powers delegated to the Director of Public Works (Town Engineer) are stated as follows:

‘1. To make recommendations to improve building, drainage and other plans required to be submitted to the Council and which are in accordance with the requirements of any bye-law, regulation or town planning scheme

applicable to the Council.

2. To require the rectification of contraventions of any bye-law, regulation or other law relating to the matters referred to in 1 above within his jurisdiction including town planning and township establishment, and to require the owner of any building, wall, bridge, earthwork, stoop, veranda or other structure, which is unsafe or dangerous or which has been allowed to fall into a dilapidated, ruinous or unsightly condition, to pull it down to render it safe or to repair, alter or remove it altogether with any resultant rubble within a period of not less than 120 days from the date of the notice issued in the above regard.

3. The control and management of public streets and places vested in Council.

4. The construction and improvement of public streets.

5. To control access to public streets.

6. To temporarily close streets and public places.

7. To take over private streets.

8. To approve the construction of private streets.

9. To enforce those aspects of the urban government regulations dealing with public works.

10. To authorize expenditure in the department in accordance with the approved estimates.

11. To implement council human resources policies pertaining to the department or office.

12. To delegate as appropriate, some of the powers or responsibilities delegated to his office under this instrument.'

[12] Again, on 3rd May, 2012, in a Special Council Inaugural Meeting held in its Chambers, the Council resolved *inter alia* that:

'1. The functions, powers and duties not specifically reserved for the

Council in terms of the Urban Government Act of 1969 be delegated to the Chief Executive Officer and Heads of Departments in terms of section 125 of the said Act and the delegation instrument currently obtaining is retained.

2. The new delegated powers should be reviewed to align with the new structure.'

These minutes were signed and certified by the Mayor as correct on 26th June 2012.

[13] As noted above, any delegation of powers made by Council are subject to the approval of the line Minister. The only approval by the relevant minister that was exhibited in court is a letter from the Principal Secretary in the relevant Ministry dated 28 July, 2010. By this letter the Principal Secretary advised or informed the Council through its Chief Executive Officer, that the Minister had approved the "delegation of powers to officers of the Municipal Council of Mbabane for the Civic year 2010/2011.' This letter, Counsel for the respondent argued, is irrelevant in these proceedings. It relates to an entirely different period and cannot be transposed to these proceedings instituted in 2013. I agree.

[14] One notes further from the powers delegated to the Town Engineer

that the authority to sue or institute or defend legal proceedings for and on behalf of the Municipal Council is not listed, even in this undated document. These powers, to litigate are delegated instead to the Clerk to the Council per clause 2 thereof. In particular in terms of clause 2(e) the Clerk is mandated or authorized “to take all necessary action, including action at the High Court or any other court, to enforce:

- ‘(i) the provision of the Council’s town planning scheme;
- (ii) any condition in respect of which the Council has jurisdiction relating to a township, an erf in a township, agricultural holding or farm portion;
- (iii) the provisions of the Council’s bye-laws and any applicable regulations; [and]
- (iv) any right of the Council whatsoever and howsoever arising...’

These powers extend to the noting and dealing with appeals as well. To enforce municipal regulations generally and extra-curially is one thing. To do so through litigation or through the courts, another entirely different.

[15] From the above facts and analysis of the applicable law, it is plain to me that Mr Masina, in his capacity as the City Engineer has no mandate or authority to institute these proceedings. The powers to litigate on behalf of the Council were never delegated to him and even

if such powers were duly delegated to him, such delegation has not been approved by the line Minister. The point in limine is thus good in law and is hereby upheld.

[16] Because Mr Masina was not lawfully authorized by the Municipality to institute this application, I do not think it would be proper and legally just to saddle the municipality with the costs of this application. These costs must, inevitably be borne by Mr Masina himself and I so order.

[17] As noted above, the dispute between the Municipality and the respondent dates back to 2011. That is a long time ago. A litigant is not expected or entitled to wait inordinately before filing an urgent application. That new circumstances may have developed, such as representation by members of the public at Mahwalala to the City Council about the business activities of the respondent on the plot in question may not be sufficient reason for the City Council to start running to court on an urgent basis to the prejudice of the court roll and the respondent herein. I make no firm finding on this point though, as I believe it is not necessary for me to do so in view of the

conclusion I have reached above.

[18] The Municipality is at liberty to file its application through its duly authorized officers. This is so because the present application was not its application but that of Mr Masina who was on a frolic of his own.

[19] For the foregoing reasons, the application is dismissed with costs.

MAMBA J

For Applicant

Mr Z. Jele

For Respondent

Mr B.S. Dlamini