



IN THE HIGH COURT OF SWAZILAND

Civil case No: 610/2013

In the matter between:

DEBBIE SELLSTROOM

APPLICANT

AND

MINISTRY OF HOUSING AND URBAN

FIRST RESPONDENT

DEVELOPMENT

SECOND RESPONDENT

SWAZILAND NATIONAL HOUSING BOARD

THIRD RESPONDENT

THE ATTORNEY GENERAL

FOURTH RESPONDENT

LUNGILE MASEKO

FIFTH RESPONDENT

J.M. MTHETHWA

Neutral citation:

Debbie Sellstroom v. Ministry Of Housing And Urban

*Development and Four Others (610/2013) [2014] SZHC120
(19 June 2014)*

Coram:

M.C.B. MAPHALALA, J

Summary

Civil Procedure – Review Proceedings – Rule 53 (I) of the High Court Rules considered – application made reviewing, setting aside and/or correcting the decision of the first and second respondents in allocating a house to the fourth respondent – she further sought an order setting aside the registration and transfer of the property to the fourth respondent – held

that the applicant was afforded the opportunity to make submissions to the Allocations Committee in accordance with the principle of the “*audi alteram partem*” before the decision was made, and, that there was no irregularity committed by the Committee in the handling of the application – held further that there was an unreasonable delay in lodging the review proceedings and that no application for condonation was made – application dismissed.

JUDGMENT
19 JUNE 2014

- [1] The applicant sought an order reviewing, setting aside and/or correcting the decision made by the first and second respondents in allocating House No. 259, Two Sticks Extension 3, Zakhele Township in Manzini to the Fourth Respondent. She further sought an order for costs in the event of opposition.
- [2] It is common cause that House No. 259 referred to above was allocated to the fourth respondent’s mother, Maria Maseko, now deceased, by the Allocations Committee of the second respondent. The first respondent is the government Ministry in charge of the second respondent. The deceased resided on the property with her daughter, the fourth respondent.
- [3] The deceased subsequently moved to House No. 50 Lweti Street, Two Sticks at Zakhele Township in Manzini where she stayed until her death. It is not clear from the evidence how she acquired this house. It was at that time that she leased House No. 259 to the applicant in April 1995 at a monthly rental of

E200.00 (two hundred emalangeni). Both houses were owned by the second respondent but preparations were being made to transfer the houses under the Two Sticks Project to the people allocated. The houses were part of a housing project initiated by the government to provide low cost housing to indigenous people.

[4] Upon the death of the fourth respondent's mother, the applicant tried for many years to have House 259 allocated to her by the Allocations Committee without success. On the 28th July 1997 the Allocations Committee informed the applicant that her application could not succeed on the ground that the property had already been allocated. She contends that the Committee should have given her an opportunity to be heard before making the allocation. She was told by the Committee that there was no forum to appeal its decision and that it was final. Her appeal to the first and second respondents was not successful as she did not receive a response. However, in February 2000 she received correspondence from the second respondent informing her that she would only be considered for allocation to House 259 if the fourth respondent declined the offer to purchase the house as the next of kin to the deceased. She was further advised that such a decision had been taken by the Committee on the 28th July 1997.

[5] The applicant's grounds of review are as follows: firstly, that the first and second respondents committed a gross travesty of justice and acted *ultra-vires*

by failing to exercise a fair administrative procedure and thus exercised their powers oppressively and unreasonably in allocating the property to the fourth respondent. Secondly, that they failed to adhere to the principle of Natural Justice, the “*audi alteram partem*”, by not affording her the opportunity to be heard before allocating the property. Thirdly, that the Committee denied her legal representation on the basis that lawyers were not allowed to appear before the Allocations Committee. Lastly, that they were biased in their decision by failing to give her proper reasons for their decision.

- [6] Notwithstanding the grounds of review, it is apparent from the evidence that the applicant appeared before the Allocations Committee on the 11th July 1997 together with other applicants. All the occupants including the applicant were told to vacate the houses on the basis that they were not allocated to them. On the 28th July 1997 the applicant together with the other applicants appeared before the Allocations Committee where each of them was given an opportunity to be heard. The applicant explained how she came to occupy the house and why she wanted the house to be allocated to her.

Paragraph 5 of the Minutes of that meeting states as follows:

“5.

The Allocations Committee clarified to her that the Two Sticks houses are allocated in accordance to the Allocations Criteria, i.e., people who were registered tenants of the National Housing Corporation. It was mentioned to her that the house was allocated to Ms Maria Maseko in

trust of her children who are still minors to be allocated the land. She was told that her application for a vacant plot would be considered when other applications are reviewed. She was then told that arrangements to still occupy the house should be consulted with Ms Maseko's family.

The Maseko family mentioned that they want the house in order to be able to extend it. The Residents Committee advised them that if they have problems in resolving the issue, for assistance they should report it to them.

Ms Sellstroom asked to appeal the decision taken by the Allocations Committee. The Allocations Committee found it difficult to accept her appeal because the house is not hers and she agreed, her request was rejected.”

[7] It is apparent from the evidence that the applicant was afforded the “*audi alteram partem*”. Similarly, it is not in dispute that House 259 was allocated to the fourth respondent's mother long before she leased the property to the applicant. There is no evidence that the Allocations Committee acted *ultra-vires* or committed a travesty of justice as alleged or at all.

[8] The fourth respondent has filed a Notice to Raise Points of Law. Firstly, she contends that the application contravenes Rule 53 (1) (b) of the High Court Rules on the basis that the application was not directed to the chairman of the Allocations Committee whose decision she seeks to review. Secondly, that the application for review has been unduly delayed on the basis that the applicant has been aware of the decision of the Committee since July 1997 according to her founding affidavit but did nothing. Thirdly, that the applicant has failed to

cite the Chairman or any officer of the Allocations Committee whose decision she seeks to review.

[9] Notwithstanding the Points of Law raised, it is apparent from the evidence that the applicant filed a Notice of Application for Joinder of Mr. J.M. Mthethwa, the Chairman of the Two Sticks Allocations Committee as the Fifth respondent. The application was duly served upon the respondents. Justice Stanley Maphalala PJ granted the application for joinder on the 28th September 2012.

[10] Rule 53 (1) (b) of the High Court Rules provides the following:

“53. Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a) Calling upon such persons to show cause why such decisions or proceedings should not be reviewed and corrected or set aside, and

(b) Calling upon the magistrate, presiding officer, chairman or officer as the case may be, to despatch, within fourteen days of the receipt of the notice of motion, to the Registrar the record

of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.”

Similarly, the Record of Proceedings which the applicant seeks to review has been attached to the application; to that extent the applicant has complied with Rule 53 (1) (b). The reasons for the decision have also been stated in the Record of Proceedings. In the circumstances the first and third Points of Law cannot be sustained and are hereby dismissed.

- [11] The second Point of Law relates to the time taken by the applicants to lodge the Review Applications. It is contended by the fourth respondent that there has been an unreasonable and undue delay in lodging the application on the basis that the decision sought to be reviewed was made in July 1997. It is trite law that an applicant for review who fails to bring the application within a reasonable time may lose his right to complain of the irregularity in regard to which the review is brought in the absence of condonation.

See Lion Match Co. Ltd v. Paper Printing Wood and Allied Workers Union 2001 (4) SA 149 (SCA) 156; *Mamabolo v. Rustenburg Regional Local Council* 2001 (1) S.A. 135 SCA at 141.

A period of thirteen years is by any stretch of imagination sufficient to constitute unreasonable delay in lodging review proceedings. No application

has been lodged for condonation otherwise this court would have considered whether such delay should be condoned.

[12] It is well-settled that procedural fairness gives rise to a duty upon the decision-maker to afford the affected party an opportunity to be heard before a decision is taken which adversely affects his rights, interests or legitimate expectations; and, a failure to observe this rule would lead to invalidity. See the case of *Mamabolo v. Rustenburg Regional Local Council* 2001 (1) SA 135 SCA at 144. I am satisfied that the Two Sticks Allocations Committee did observe the Rules of Natural Justice and afforded the applicant the “*audi alteram partem*” before reaching its decision.

[13] *His Lordship Tebbutt JA* delivered a unanimous judgment of the Supreme Court of Swaziland in the case of *Takhona Dlamini v. The President of the Industrial Court and Another* Appeal case No. 23/1997. His Lordship quoted with approval the judgment of *Corbett JA* in the case of *Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd* 1988 (3) SA 132 at 152 where the learned Judge said the following:

“Broadly, in order to establish review grounds, it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behest of the Statute and the tenets of Natural Justice such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further ulterior or improper

purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter aforestated”

[14] As stated in the preceding paragraphs, the fourth respondent’s mother was allocated the property long before she leased it to the applicant. Furthermore, the Allocations Committee considered her application; and, she was given an opportunity to motivate her application. The Committee issued their decision after due consideration; the reasons for the decision were properly given. In the circumstances the Committee did not commit any irregularity in the handling of the application.

[15] Accordingly, the application is dismissed with costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant
For Fourth Respondent

Attorney Charles C. Snyman
Attorney Leo Gama