IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1455/13

In the matter between:

SWAZILAND NATIONAL SPORTS COUNCIL	**Applicant**
vs	
MINISTER OF SPORTS, CULTURE & YOUTH AFFAIRS	**1ST Respondent**
PRINCIPAL SECRETARY MINISTRY OF SPORTS, CULTURE & YOUTH AFFAIRS	**2ND Respondent**
THE ATTORNEY GENERAL	**3RD Respondent**
MENZI DLAMINI	**4TH Respondent**
SWAZILAND NATIONAL SPORTS & RECREATION COUNCIL	**5TH Respondent**
SWAZILAND SAVINGS AND DEVELOPMENT BANK	**6TH Respondent**

Neutral citation: *Swaziland National Sports Council vs Minister of Sports, Culture and Youth Affairs and 5 Others (1455/2013) [2014]SZHC 13 (19th February 2014)*

Coram: **MAPHALALA PJ**

Heard: **17th December 2013**

Delivered: **19th February 2014**

For Applicant: Mr. B. Magagula

For Respondents: Mr. V. Kunene: 1st, 2nd & 3rd Respondents

Mr. L. Mamba: 4th & 5th Respondents

Summary:

(i) Before court is an Application for a *mandamus van spolie* interdict after Respondent has taken possession of the belongings of the Applicant.

(ii) The Respondent contends that Applicant consented to the change of ownership of the Applicant leading to the establishment of the 5th Respondent.

(iii) In the result, this court finds on the affidavits of the parties that the Respondents dispossessed the Applicant and therefore the Application is granted the rule nisi is accordingly confirmed.

Legal authorities referred to in the judgment

1. **Shell Oil Swaziland (Pty) Ltd vs Motor World (Pty) Ltd t/a Sir Motors, Appeal Case No.23/2006**
2. **Baker et al, The Civil Practice of the Magistrates Court in South Africa, Vol.1**
3. **Olivier et al, Law of Property, 2nd Edition**
4. **Niro Boniro vs de Lange 1906 T.S. 123**

JUDGMENT

The Application

[1] Serving before this court is an Application which was brought by the Applicant, the Swaziland National Sports Council against the Respondents under a Certificate of Urgency for orders in the following terms:

"1. That the Rules of the above Honourable relating to usual forms, service and time limits be dispensed with, and that this matter be heard as one of urgency in terms of Rule 6(25) of Rules of the above Honourable court.

2. That 4th and 5th Respondents, their employees, workmen and other persons claiming the right of possession of the offices situate at E2 Print Park Square, Sheffield Road, Industrial Sites, Mbabane, be directed and ordered to immediately restore the undisturbed possession and control of the premises to the Applicant with immediate effect.

3. That the Sheriff or his deputy be authorised to eject the 5th Respondent, its employees and other persons claiming the right of possession of the premises through the 5th Respondent in the event of possession and control of the premises not having been restored to the Applicant within twenty four (24) hours from the date of service upon the Respondents and/or all other persons who may be found to be in possession or control of the premises (other than the applicant's representatives) of this order by the Sheriff or his Deputy.

4. That the 1st, 2nd, 3rd, 4th and 5th Respondents be interdicted and restrained from interfering in whatever manner with the Applicant's responsibilities as outlined in the Memorandum of Understanding signed by the Applicant and the Swaziland Government dated the 8th July 2010.

5. That the 4th and 5th Respondents be interdicted from conducting the Applicant's bank account No.77017919410 held with the 6th Respondent.

6. That the establishment of the 5th Respondent and its Board of Directors as published in Legal Notice No.112/2013 be declared unlawful and no legal force and effect.

7. That all the Respondents be ordered to pay the costs of this application jointly and severally at an attorney and client scale the one paying the other to be absolved.

8. That pending finality hereof, prayers 1, 2, 3, 4, 5, 6 and 7 be with immediate and interim relief.

9. Further and alternative relief."

A brief background

[2] It is important to point out at this stage that the Application before me is a sequel to an Application before *Ota J* of this court granting an interim order in the abovementioned matter brought under a Certificate of Urgency. The learned *Chief Justice* of this court then directed that this matter be heard and decided by this court on the merits as a matter of urgency. I must also put it on record that the learned *Ota J* gave a detailed judgment on the preliminary points which were raised by the Respondents before that court granting an interim order thereof. What remains for decision by this court are the merits of the dispute between the parties.

[3] The parties in this dispute were described in great detail in the judgment of *Ota J* mentioned above and for ease of reference I will only refer to them in summary form. Applicant is Swaziland National Council who has filed an urgent Application for prayers stated above in paragraph [1] of this judgment against the six (6) Respondents cited above.

The affidavits of the parties

[4] The Applicant has filed the Founding Affidavit of one Sikhatsi Dlamini who is the Vice Chairman of the Applicant where he related in great detail the background to the case and the issue for decision by this court. Various annexures pertinent to this dispute are filed thereto.

[5] The Respondents oppose the granting of the above orders and have filed the requisite Opposing Affidavits. In respect of the 1st, 2nd and 3rd Respondents have filed the Answering Affidavit of Mr. Sicelo Dlamini who is the Principal Secretary of the Ministry of Sports, Culture and Youth Affairs representing the Swaziland Government.

[6] For the 4th and 5th Respondents an Answering Affidavit of one Menzi Dlamini who is Chairman of the 5th Respondent is filed thereto.

[7] The Applicant then filed a Replying Affidavit in accordance with the Rules of this Court.

The arguments of the parties

[8] The Applicant filed its Heads of Arguments when the matter was heard by *Ota J* which more or less dealt substantively with the issues for determination. These Heads of Arguments address the issues that have

been raised subsequent to the filing of the Answering Affidavits by the Respondents. It is important to mention that not all the cited Respondents are opposing the matter. It is only the 1st to 5th Respondents. The 6th Respondent is not opposing the matter.

[9] The gravamen of the Applicant's case is that there is nothing raised in both Answering Affidavits filed on behalf of the Respondents which can upset the interim order already granted by the court. On the other hand the attorneys for the Respondents advanced forceful arguments against this argument by the Applicant.

(i) The arguments of the Applicant

[10] The attorney for the Applicant, Mr. Magagula advanced arguments on the merits of the dispute and filed very comprehensive Heads of Arguments for which I am grateful.

[11] The nub of the arguments of the Applicant is that Applicant has sought in prayer 2 of the Notice of Motion a relief of *mandamus van spolie ante omnia*. That the court has already granted a *rule nisi* for that prayer. In prayer 2 the Applicant seeks that the 4th and 5th Respondents, employees,

workmen and other persons claiming the right of possession to the offices situate at E2 Print Park Square, Sheffield Road, Industrial Site, Mbabane be directed and ordered to immediately restore the undisturbed possession and control of the premises to the Applicant with immediate effect.

[12] That the factual support to this relief is found in paragraph 22 of the Applicant's Founding Affidavit. The crux of which is that one Mr. Darius Dlomo acting on the strength of his official capacity as the Chief Executive Officer of the 5th Respondent prevented the Applicant's Board of Directors from accessing Applicant's offices at Print Park Building. That Mr. Dlomo did so without a court order.

[13] Various arguments are advanced in the Heads of Arguments of the attorney for the Applicant on the submission mentioned above in paragraph [12] and I shall revert to some of these arguments later on in my analysis and conclusions in this case. The gravamen of the arguments of the Applicant is that if one scrutinizes both sets of the Answering Affidavits of the Respondents filed that the justification for the spoliation is that the 5th Respondent is a parastatal because its name was published in the Government gazette. That one cannot acquire proprietary rights as a result of a publication in a Gazette.

[14] In support of all the arguments advanced the attorney for the Applicant has cited a *plethora* of decided cases in this court and in South Africa on *mandamus van spolie* interdict.

[15] Furthermore it is contended for the Applicant that the Respondents position is legally incorrect. That the truth of the matter is that the Swaziland Government ambushed the Applicant. There is no instrument incorporating the 5th Respondent as a legal persona. There is no act establishing the 5th Respondent as it happened with the establishment of the parastatals like the Swaziland Electricity Company, Swaziland Water Services etc.

[16] The Applicant's attorney cited the cases of *Mefika Matsebula vs Mandla Ngwenya, High Court Case No.4306/2010, Setlogelo vs Setlogelo 1914 AD 221, Swaziland MTN Limited and 3 Others vs Swaziland Posts and Telecommunications Corporation, Civil Appeal Case No.58/2013, Jomas Construction (Pty) Ltd vs Khanya Proprietary Limited Case No.48/2011* and that *Shell Oil Swaziland (Pty) Ltd vs Motor World (Pty) Ltd t/a Sir Motors Case No.23/2006* in support of its arguments stated above.

[17] I shall revert to some pertinent arguments later on in the course of this judgment.

(ii) 1st, 2nd and 3rd Respondents' Arguments

[18] The attorney for the 1st, 2nd and 3rd Respondents Mr. V. Kunene also advanced comprehensive arguments and filed Heads of Arguments for which I am grateful.

[19] The first argument advances is a point raised *in limine* to the proposition that Applicant has not filed a Replying Affidavit within the time stated in the High Court Rules.

[20] On the merits of the dispute the thrust of the argument on behalf of the 1st, 2nd and 3rd Respondent is that the Applicant is not a non profit making organisation as alleged in the Founding Affidavit at page 14 paragraph 3 of the Book of Pleadings. That the Applicant ceased to be a non-profit making organisation when it became a parastatal in 2013. The Applicant was listed as a category a parastatal by Legal Notice No.19 of 1212 at page 121 of the Book of Pleadings of the Public Enterprise (Control and Monitoring) Act 1985 at page 82 of the Book of Pleadings.

[21] Various arguments are advanced in paragraphs 2.2, 2.2.1, 2.3, 2.4, 2.4.1, 2.5, 2.6, 2.7, 2.8, 3, 3.1.1, 3.1.2 and 4 of the Heads of Arguments of attorney for the 1st, 2nd Respondents and I shall revert to these arguments later on in my analysis and conclusions thereon.

[22] I think, it is important to reproduce the arguments of the 1st, 2nd, and 3rd Respondents for a better understanding of the issues for decision by this court from paragraph 3 to 4.2 of the Heads of Arguments as follows:

> *"3. Respondents therefore submit that if the Applicant did not want the Applicant to be a category A entity, they should have objected to it when such was done. However the Applicant never objected only to challenge it now when they discover that some of them have not been reappointed into the Board.*
>
> *3.1.1 Respondents submit that the Applicant did accept the listing of Applicant to category A entity in that they conformed to the dictates of the Public Enterprise Unit Act to the extent that they accepted to be board the appointment of representatives from Ministry of Sports, Ministry of Education and Ministry of Finance which also changed the reporting to be inconformity with the Public Enterprise Act. In particular prior to the listing of the Applicant to category A entity, reporting was done to the General Assembly and the Ministry of Sports, however in terms of the Act reporting has to be done quarterly to the Public Enterprise Unit.*

3.1.2 *Respondents further submit that the Applicant is fully funded by Government except for donors for specific projects. As can be noted from page 152 of the book the audited statements. The only other income for the Applicant other than the one from Government, was a donation from Australia which was for a specific project called "Asidlale" or "let's play" project, and which project shall continue as all the responsibilities of the Applicant will be the responsibility of the 5th Respondent including its assets and liabilities.*

4. *On the issue of the policy, Respondents submit that it was a delegated action by the Minister of Sports or 1st Respondent herein to the Applicant. As such even the funding for the project was fully funded by the Swaziland Government under the 1st Respondent as can be seen from annexure at page 165.*

4.1 *It is Respondents further submission that the policy was never hijacked by the 1st Respondent as alleged by the Applicant. CILO Consultants who were engaged to draft the policy completed their assignment and submitted same to the 1st Respondent as the last stakeholder and financier of the project. The final draft was submitted to the 1st Respondent by the Applicant's Chief Executive Officer (Dan Mavuso at that time) and requested that they (CILO) be paid the third and final phase of their payment for the project.*

4.2 *It was after the final draft have been presented to the 1st Respondent that the 1st Respondent then engaged another consultant to fine tune the policy and add international flavour. Otherwise it is Respondents' submission that it is the same policy that was done by CILO. However, it is the Respondents' submission that it was within the 1st Respondent's right to accept and/or reject recommendations for incorporation into the policy."*

[23] The above are the arguments on behalf of the 1st, 2nd and 3rd Respondents and the final submission made is that the *rule nisi* be discharged forthwith.

(iii) The 4th and 5th Respondents arguments

[24] The attorney for the 4th and 5th Respondents, Mr. L. Mamba also advanced arguments and filed useful Heads of Arguments for which I am grateful.

[25] The essence of the arguments for the 4th and 6th Respondents is that Government is the Supreme Sports Governing Authority as provided by section 64 of the Constitution of Swaziland. That in terms of section 60(7) of the Constitution, the State has the prerogative to promote sports and recreation. That Government exercises this role through the Ministry of Sports, Culture and Youth Affairs. The Ministry has a right to work with any agency, organization or entity to promote sports and may appoint any entity as its principal delegate in the administration of sports. It is on this basis that the Memorandum of Agreement (NOA) referred to in these procedures was entered into.

[26] That a voluntary association has ordered itself as "the supreme body on all sports matters in Swaziland" in its Constitution does not constitute such body as supreme. Certainly such supremacy cannot override that of Government which has its basis in the national Constitution.

[27] Various arguments are advanced in paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Heads of Arguments in respect of the Public Enterprise Unit (effect of Legal Notice). I shall revert to these arguments in my analysis and conclusions later on.

[28] In paragraph 14, 15 to 16 it is contended for the 4th and 5th Respondents that in fact the Applicant is the 5th Respondent on the following legal proposition:

> *"14. In our submission, it was always open to the Minister for Sports, Culture and Youth Affairs as the head of the Swaziland National Sports Council to amend the name pursuant to the Report on the Swaziland National Sports Policy 2012 (pages 101 – 117) to properly reflect Government Policy. A change of name is not an amendment of the constitution."*

[29] The final arguments for 4th and 5th Respondents is on the question of costs that the Application is unauthorised, the deponent acts in his personal

capacity and as such costs to be awarded against him *de bonis propriis.* That the court ought to discharge the *rule nisi* forthwith.

The court analysis and conclusion thereon

[30] Having considered the able arguments of the attorneys of the parties the first port of call is a determination of the preliminary point raised by the 1st, 2nd, and 3rd Respondents and then proceed to the merits of the case whether the Respondents have advanced any defence to an Application for a *mandamus van spolie*.

(i) On the point *in limine*

[31] The issue for decision on this point is the argument by the 1st, 2nd and 3rd Respondents that Applicant has not filed a Replying Affidavit in accordance with the Rules of this Court and therefore it ought to be rejected forthwith. The attorney for the 1st, 2nd and 3rd Respondents advanced forceful arguments on this point and the attorney for the other Respondents Mr. Mamba aligned himself with these contentions.

[32] On the other hand the attorney for the Applicant Mr. Magagula advanced *au contraire* arguments to the general proposition that if a party has

delayed to file a pleading within the time limits (if they have not been dispensed with) it files a notice of bar or issue a notice in terms of Rule 30. That in the instant case none of the two procedures have been satisfied. That the Respondents are only objecting when the Replying Affidavit has been filed and that it was before court. That the Applicant has not been barred from filing a Replying Affidavit in terms of Rule 26 of the High Court Rules.

[33] In my assessment of the arguments of the parties on this point it is my considered view that the position adopted by the Applicant is correct in all respects. More importantly the Respondents have not followed the procedures prescribed by the Rules of this Court as stated above in paragraph [31] of this judgment.

[34] Furthermore, I would adopt the *ratio* in the Supreme Court case of *Shell Oil Swaziland (Pty) Ltd vs Motor World (Pty) Ltd t/a Sir Motors, Appeal Case No.23/2006* and would allow the Replying Affidavit of the Applicant.

(ii) On the merits of the case

[35] Coming to the merits of the case it is common cause between the parties that an interim order for a *mandamus van spolie* has been granted by this court *(per Ota J)* and the only issue for determination by this court is whether the Respondents have advanced any defences recognised by the law on this remedy. I must emphasize that is the only question for decision by this court.

[36] Before proceeding to do so I wish to sketch briefly the law regarding the remedy of *mandamus van spolie*.

[37] According to the learned authors *Baker et al, The Civil Practice of the Magistrates Courts in South Africa, Vol.1* at page 84 defines spoliation as any illicit deprivation of another of the right of possession which he has whether in regard to movable, or immovable property or even in regard to a legal right.

[38] Further at page 85 thereof the learned authors state that in order to obtain a spoliation order two allegations must be made and proved:

> *"(i) That the Applicant was in peaceful and undisturbed possessed of the property; and*

(ii) *That the Respondent deprived him of the possession forcefully or wrongfully against her consent."*

[39] In this regard I refer to the cases of *Nino Bonino vs de Lange 1906 T.S. 123* and that of *Claassens vs Monia Motors 1976(2) SA 83(O)*.

[40] The learned authors *Olivier et al* in their legal textbook *Law of Property, 2nd Edition* at page 182 state the following:

> *"The uniqueness of the* mandamus van spolie *has implications for its application. Apart from the requirements for the remedy and the acceptability of defences, there are a few applications by which the unique purpose and function of the remedy are emphasized:*
>
> (a) *Since the* mandament *is aimed at the preservation of existing control relationships, all extra-judicial takings of existing control through self-help are affected by it, even when they are authorized by statute. As a result statutes of this nature are interpreted restrictively.*
>
> (b) *Since the* mandament *maintains public order against unlawful self-help, the government is subject to it. The government can of course avail itself of the same defences that are at the disposal of any other respondent, among other considerations by which the action concerned is justified, such as urgent and immediate danger to the state. The* mandament *can be excluded by statute, as was done to a large extent by means of the inclusion of section 3B in the* Prevention Illegal Squatting Act 52 *of* 1951. *In principle, however, the government is also subject to the* mandament van spolie, *and statutory measures which curtail or suspend its functioning will be interpreted restrictively. It is also expected that the procedures and conditions of*

the authorizing act be adhered to strictly prima facie *unlawful self-help and spoliation is to be condoned on the authority of an act.*

(c) *The courts have repeatedly emphasized that agreements which purport to justify the taking of control by means of self-help are against the public interest and void. This has been applied in the case of a lease which grants the lessor the right to deprive the lessee of his right to enter the lease premises without legal procedure, a contract which authorizes the seller to repossess the thing without legal procedure and a lease which grants the lessor the right to repossess the lease object without legal procedure."*

[41] According to the principles of law a Respondent who seek to oppose such an Application ought to advance a defence recognisable in law. The learned authors *Olivier et al* cited in the legal authority above outlines admissible defences for a *mandamus van spolie* as follows:

"14.4.5.3 *Admissible defences*

Apart from the inadmissible defences mentioned above, which can never succeeded against the mandament van spolie, *a number of defences which are admissible and which may succeed are available. The respondent must raise and prove the necessary facts to succeed with these defences. If he does so the application will fail even if the applicant has satisfied all the requirements. The following defences are available.*

(a) *Applicant did not have control*

Even if the applicant's evidence prima facie *proves that he had the required control, the respondent may adduce and prove additional facts to show that the applicant's control was insufficient. In such a case the respondent rebuts the*

applicant's proof with regard to control. This rebuttal may be based upon facts that prove that the applicant did not exercise the required minimum of physical control over the thing, or that his control was not exercised with the required intention to control for own benefit, or that the control was not durable or stable enough to justify the order.

(b) *Respondent did not commit spoliation*

Absence of spoliation may be raised as a defence in the same way as absence of control. A number of reasons for the absence of spoliation may be adduced: that the respondent was neither directly nor indirectly involved in the alleged spoliation, or that there was no actual interference did not amount to spoliation because it was justified by common law or legislation. The defence of counter-spoliation is an example of a valid defence on this basis.

(c) *Unreasonable delay*

An unreasonable long delay between the alleged spoliation and institution of the application may be a valid defence. A general rule of thumb for this defence was set out in Jivan v National Housing Commission: *if the delay is shorter than a year the respondent must show reasons why the delay must be considered unreasonably long; and if the delay is longer than a year the applicant must show reasons why it is not unreasonably long. In the latter case the delay is seen as an indication of the applicant's acquiescence, and then he must show reasonable to rebut the inference. In fact this defence of unreasonable delay is related to the defence that the action was lawful because of the applicant's consent. It is possible, however, that there may be good reason for a long delay.*

(d) *Restoration is impossible*

The admissibility and validity of the defence that restoration is impossible have been the source of much debate. In this regard the following principles seem to be reasonably clear:

(aa) *It is accepted that the restoration order may include more than the order to give the thing back. In addition to mere restoration the respondent may be ordered to perform actions in order to actually restore the* status quo ante. *That may include reparations, assembly or installation of the thing involved. If the respondent is still in control of the thing restoration is possible, even if reparations are required.*

(bb) *Restoration is possible even if the respondent is not in control, but able to acquire control or to restore without actually acquiring it himself. Restoration is not impossible simply because a third party is in control. If the third party is a* mala fide *transferee who was aware of the spoliation the* mandament van spolie *may be enforced against him. The courts are loath to enforce the* mandament van spolie *against* bona fide *third parties, but even then restoration is possible if the respondent is reasonably capable of acquiring control from them."*

[42] The above therefore are the legal principles applicable to a determination of the present case. The next question therefore is whether the purported defence of the Respondents fit any of the above defences as outlined in paragraph [41] *supra*.

[43] The gravamen of the Respondents defence is that the Applicant is not a non-profit making organisation as stated in the Applicant's Founding

Affidavit at page 14 paragraph 3 of the Book of Pleadings. The question I ought to ask at this stage is whether the defence raised by the Respondent fit any of the defences listed above in paragraph [41] of this judgment that however remains to be seen.

[44] According to the Respondents the Applicant ceased to be a non-profit making organisation when it became a parastatal in 2012. The Applicant was listed as a category A parastatal by Legal Notice No.19 of 2012 at page 121 of the Book of Pleadings.

[45] The argument of the 1st, 2nd and 3rd Respondents' attorney is that in terms of the Act in section 2(a) thereof defines a public enterprise in relation to category A of the schedule of the Act to be a **public enterprise or body which is either wholly owned by Government or in which Government has a majority interest or which is dependant upon Government subvention for its financial support (herein referred to category A public enterprise).**

[46] The crux of the argument of the Respondents aforesaid is that the listing of the Applicant to be a category A enterprise in April, 2012 under Legal Notice No.119 or 1912, section 2(31) therefore meant that the Applicant

was no longer a non-profit making organisation but a Government parastatal. That when the Applicant was made a parastatal in 19th April, 2012 the Applicant did not object to this. That if the Applicant had objected in its listing to be a parastatals the Applicant would not have been listed as stated above.

[47] The Respondents further contend in this argument that in terms of the Memorandum of Understanding between the Applicant and the Swaziland Government in Article 17 thereof a page 99 of the Book of Pleadings states that "duration – this Memorandum of Understanding shall remain valid and legally enforceable unless terminated by agreement between the parties and/or until such time **council ceases to be council and becomes a legally recognized public enterprise.** That therefore in terms of the Memorandum of Understanding, it ceased to operate after the Applicant ceased to be a Council and became a public enterprise.

[48] The Applicant on the other hand has advanced arguments canvassed from paragraph 7.5 to 7.7 of the Heads of Argument commencing with the proposition that it is common cause that a legal persona can either be

incorporated in terms of the Company's Act, a Deed of Trust or such other enactment that ushers its existence.

[49] It is contended for the Applicant that the PEU Act which has been used as a justification by the 2nd, 4th and 5th Respondents in their affidavits before court does not give legislative powers to the Minister to establish a parastatal. That it does not on its own provide the power to the Minister of Finance to simply by mere publication in a Gazette to establish a parastatal. Let alone to convert an existing private non profit organisation into a Government parastatal. That the 5th Respondent does not have powers to sue or be sued in its own name.

[50] In my assessment of these two competitive arguments of the parties it would appear to me that the arguments of the Applicant are correct on all fronts as stated in its Heads of Arguments.

[51] Firstly, in answer to what is stated at paragraph [44] of this judgment, the Applicant contended at length that what appears in paragraph [44] cannot be. A parastatal is a company which is partly owned by the Government. That organisation must have its own establishing document which fully set out the nature of its existence, its responsibilities powers and

objectives. It cannot be that a simple publication of a name, in the form of the 5th Respondent has the consequences of establishing an organisation. Furthermore on this point I agree with the Applicant that the Minister cannot convert a private organisation into a parastatal without its consent.

[52] Furthermore under this Heads of Argument I find the *dicta* in the High Court case of *Charles Dlamini & 3 Others vs Registrar of Insurance and Retirement Fund & 3 Others Case No.539/2012 (unreported)* apposite. In this case in paragraph 31 thereof the court held on the fact that in 1994, the legislature established the Swaziland Water Services and Sewerage Board which ceased to exist as a legal entity. In this regard I agree with the analogy drawn by the Applicant's attorney that it is necessary that the legislature must establish a Government parastatal. In the present case it is worse and bizarre that Applicant is not a Government Board but a private non-profit organisation that has nothing to do with Government, save for the Memorandum of Understanding entered into by the parties.

[53] Secondly, in the Answering Affidavit filed by the Respondents it is alleged that the creation of the 5th Respondent mean the 'deletion' of the Applicant and as such the 5th Respondent will take over all the

responsibilities of the Applicant. The Applicant is a non-profit making organization established by its own constitution as stated in annexure "SNSCI" of the Founding Affidavit. The Applicant subsequent thereto entered into a Memorandum of Agreement with the 1st Respondent which established their working relationship. The Memorandum itself prevents that the Applicant can be an agent of the Swaziland Government. The Memorandum promotes the independence of the two. Therefore on these uncontested facts is cannot be said as the Respondents contend that the Applicant is now a parastatal of the 1st Respondent. In this regard I agree with the Applicant's argument that this goes against the spirit of the agreement of the parties.

[54] Thirdly, if the Swaziland Government wanted to form another parastatal it was supposed to have properly cancelled the agreement in accordance with the provisions of annexures "SNSC2" and not to simply impose on it another organization contrary to the provisions of the Constitution of Swaziland in section 19 thereof. In this regard I agree *in toto* with the arguments of the Applicant as canvassed in paragraphs 7.9 to 8.3 of the Applicant's Heads of Arguments that on all accounts the Respondents acted in a highly Draconian fashion.

[55] I must also mention in this regard that the Respondents attorneys canvassed an argument on this point that in fact the Applicant consented to the change of status and therefore it cannot advance this argument at this stage. The Respondents contend that when the Applicant was made a parastatal in April 2012 it did not object and at paragraph 6.2 of the 1st, 2nd and 3rd Respondents Answering Affidavit at page 144 of the Book of Pleadings state the following:

> *"May I state that when that was done the Applicant did not challenge or object to the transformation. The Applicant conformed to dictates of the PEU Act to the extent that they accepted to the board the appointment of representatives from the Ministry of Sport, Culture and Youth Affairs, Ministry of Education and Training and Ministry of Finance. As a result the reporting also changed to be in conformity with the PEU dictates."*

[56] That Applicant did not challenge or object to the transformation. The Applicant conformed to the dictates of the PEU Act to the extent that they accepted to the Board of Appointment of Representatives from the Ministry of Sports, Culture and Youth Affairs, Ministry of Education & Training and Ministry of Finance. As a result the reporting also changed to be in conformity with the PEU dictates.

[57] To the above arguments of the 2nd, and 3rd Respondents the Applicant replied at paragraph 10.1 of its Replying Affidavit in the following terms:

> *"10.1 The contents of this paragraph are confusing and misleading. The 1st Respondent has given an impression to the court that the transformation was done with Applicant's consent, which is denied. In the preceding paragraph, I have put the 1st Respondent to strict proof of how this alleged transformation took place. In the event the 1st Respondent is referring to the publication in the gazette as a transformation, then it is clearly wrong. There was no way the Applicant could have objected to government publicizing information in the gazette. In any event the gazette is a forum where the government publishes information. How would the Applicant have objected to that, as it is not privy of information to be published in gazettes.*
>
> *10.2 What we are bringing to the attention of this honourable court, is that the content which was published in the gazette is unlawful, wrong and unconstitutional. On behalf of the entire board of the Applicant I deny that we accepted to the establishment of the 5th Respondent. I also aver that the manner in which the Applicant reports to the Swaziland Government has not changed. It is still in accordance with the provisions of annexure "SNSC2", which is the Memorandum of Understanding signed by the Applicant and the Swaziland Government."*

[58] The above stated positions of the parties is the nub for decision by this court. The Respondents in their Answering Affidavit did not answer these glaring facts it has become clear to me that the reason for preventing the admission of the Replying Affidavit of the Applicant by

the 1st, 2nd and 3rd Respondents was to keep the court in the dark on these important issues. I have searched high and low in the Respondents' papers for evidence to dispel the position taken by the Applicant but in vain.

[59] It appears to me further that the contentions of the Respondents that the PEU Act is justification for what has happened in this case cannot hold water. That it gives the Respondents legislative powers to the Minister to establish a parastatal. I agree with the contentions of the Applicant that this does not on its own provide the power to the Minister to establish a parastatal. That it does not on its own provide the power to the Minister of Finance to simply by mere publication in a gazette establish a parastatal let alone to convert an existing private organisation into a Government parastatal as stated earlier on in the examples of organisations like Swaziland Water Services Corporation.

[60] Lastly, the cumulative effect of the facts in this case is that the Respondents took the law into their hands and resorted to self-help described by the learned authors *Olivier et al (supra)* at page 183 paragraph (b) of the said legal text.

[61] I wish to comment *en passant* that this case demonstrates the very important principles of our constitutional framework that of legality. That a person in this country should not be deprived of his properties and existence in this fashion. Further, it is shocking to hear an officer of this court stating in open court that because Applicant is financed by Government therefore this court should take this into consideration in its judgment. I do not think so, these courts are created to give justice between man and man without fear or favour.

[60] In the result, for the aforegoing reasons the *rule nisi* granted by *Ota J* on 27th September 2013 is accordingly confirmed. I further rule in exercise of my discretion on costs that costs to be costs in the ordinary scale.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE