



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No.916/2012

In the matter between:

**MUNICIPAL COUNCIL OF MBABANE**

**Appellant**

**vs**

**LINDIWE DLAMINI**

**1<sup>ST</sup> Respondent**

**SIBONGILE HLANZE**

**2<sup>ND</sup> Respondent**

**THERESA SHABANGU**

**3<sup>RD</sup> Respondent**

**JERRY DLAMINI**

**4<sup>TH</sup> Respondent**

**ALL OTHER PERSONS ILLEGALLY**

**TRADING AT MBABANE BUS RANK**

**5<sup>TH</sup> Respondent**

**THE COMMISSIONER OF POLICE**

**6<sup>TH</sup> Respondent**

**THE ATTORNEY GENERAL**

**7<sup>TH</sup> Respondent**

**Neutral citation:** *Municipal Council of Mbabane vs Lindiwe Dlamini & Six Others (916/2012) [2014] SZHC 14 (28th February 2014)*

**Coram:** **MAPHALALA PJ**

**Delivered:** 28 February 2014

**For Applicant:** Mr. N.D. Jele

**For Respondent:** Mr. J. Mavuso for the Respondents

- Summary:
- (i) *Application against a number of persons who are street vendors in the Municipal area at Mbabane to be interdicted and restrained from trading without work permits.*
  - (ii) *The Respondents oppose the Application advancing an argument that Applicant has proceeded by way of a wrong law being Regulation 28 instead of the Principal legislation namely the Trading Licences Order.*
  - (iii) *The court finds that there is no conflict between Regulation 28 and the Trading Licences Order as the former is a product of the Principal Act.*
  - (iv) *In the result, the Application is granted in terms of the Notice of Motion.*

## **JUDGMENT**

### **The Application**

- [1] The Applicant being the Municipal Council of Mbabane has filed this Application in the long form against a number of Respondents for an order in the following terms in respect of each of the Respondents:

- “1. *The first – fifth Respondents are hereby interdicted and/or restrained from trading without work permits and/at or near the Mbabane Bus Rank;*
2. *The sixth Respondents is ordered to assist the Applicant in ensuring the compliance with the court order by the first – fifth Respondents in removing any person carrying on business at the Mbabane Bus Rank who does not have a permit from the Applicant;*
3. *Costs of the Application be borne by the first – fifth Respondents only;*
4. *Granting the Applicant further and/or alternative relief.”*

[2] The Applicant has filed a Founding Affidavit of its Acting City Secretary one Bongani Dlamini setting out the background of the matter. Pertinent annexures are also filed in support thereto.

### **The opposition**

[3] The Respondents oppose the Application and have filed an Answering Affidavit of the 1<sup>st</sup> Respondent one Lindiwe Dlamini who is one of the vendors which the Applicant seeks to interdict.

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

## **The background**

- [5] The Applicant is responsible for the enforcement of the provisions of the Principal Act and as well as the Public Health Act, 1969, which includes the general principles of promoting good health and welfare within the controlled area of the Mbabane urban area and specifically managing the Mbabane Bus Rank. That the Applicant also monitors every person selling fruits, vegetables and food within its controlled area to ensure that it complies with the Public Health (Food Hygiene) Regulations of 1973. All the business people carrying out these activities are given permits and/licences to trade at a designated place fit for such purpose.
- [6] That these procedures apply to all people carrying on any business within the controlled area of Mbabane. That business has to be in a designated place and approved by the Applicant. A person, for example, cannot just “wake up” and establish a bus rank within a street because that would be unlawful. Further that a person cannot in terms of the law sell any fruits at any place except the main market and other specially demarcated places within the controlled area.
- [7] It is averred in the Founding Affidavit that the Applicant has been trying to prevent the First to Fifth Respondents from selling their wares at the

Mbabane Bus Rank without success as they are trading without any permits and/or licenses in contravention of section 28 and 29 of the Act. The First to Fifth Respondents are selling fruits, vegetables, food and other items at the Mbabane Bus Rank in total breach of the Public Health Act and the Regulations thereto as their wares are not inspected for conformity and safety according to the Applicant.

### **A short overview**

[8] The matter appeared before me on the 25<sup>th</sup> October, 2013 where I heard arguments from the attorneys of the parties. The Applicant is represented by Mr. Jele from Robinson Bertram attorneys and Mr. J. Mavuso appears for the 1<sup>st</sup> to 4<sup>th</sup> Respondents. There was no appearance for the 6<sup>th</sup> and 7<sup>th</sup> Respondents being the Commissioner of Police and the Attorney General for the 6 and 7<sup>th</sup> Respondents, respectively.

[9] I must mention that when the matter came before me in arguments I raised a point *mero motu* that the Attorney General ought to be invited as *amucas curae* (“a friend of the court”) in these proceedings to assist the court in this case. The attorney for the Respondents supported the view of the court but the attorney for the Applicant contended that no useful purpose will be served by this exercise as the points for decision are clear

that the Applicant is seeking a final interdict. That it is neither here nor there what the Attorney General says on the matter.

[10] I have considered the pros and cons of this aspect of the matter and I think the Applicant's attorney is correct that the essence of the Application is whether the requirements of a final interdict have been fulfilled by the Applicant in the present case.

### **The arguments of the parties**

#### **(i) For the Applicant**

[11] The attorney for the Applicant filed comprehensive Heads of Arguments and also advanced arguments when I heard the arguments of the parties. The essence of the Applicant's argument is that Applicant is seeking a final interdict against the Respondents who are trading at the bus rank without permits from the Applicant. That a final interdict has the effect of finally determining the rights of the parties to the litigation.

[12] In this regard the attorney for the Applicant cited the cases of *Daniel Dinabantu Khumalo v Attorney General (unreported) Supreme Court Case No.3/2010; VIF Irrigation Farmers Association and Another*

*(unreported) Supreme Court Case No.30/2000; Maziya Ntombi v Ndzimandze Thembinkosi (unreported) Supreme Court Case No.2/2012.*

[13] That the granting of the interdict relief claimed by the Applicant would have the effect preventing the 1st to 5th Respondents from trading at the Mbabane Main Bus Rank without the permission of the Applicant.

[14] Further legal authorities are cited at paragraph 2.9 of the attorneys Heads of Arguments on the issue of absence of alternative remedy. Finally, the Applicant contends that it has made a case and applies for an order as prayed for.

**(ii) The Respondents' arguments**

[15] The attorney for the Respondent also advanced arguments against the granting of the interdict in the present case on the main ground that the Applicant has not proved requirements of a permanent interdict on the facts of this case. That in order to resolve the issue at hand it is necessary to consider the *Trading Licence Order in Council of 1975*. The attorney for the Respondent contends the following at paragraph 8(a) of the Heads of Arguments:

“(i) Section 3(a) of the above Order in Council states that;  
‘After consultation with the Minister of Interior and approval of the Council of Ministers, the Minister may by notice in the gazette declare any area to be a general business area for the purposes of this order...’

At paragraph 10.2 of the Applicant’s Replying Affidavit found at page 70 of the Book of Pleadings, Applicant contends that –

‘...annexure “A1” is not a permit but a trading license.’

Respondents submits that the Applicant does not seem to appreciate that he relies on a **regulation** and in particular Regulation 28 as above set out, whilst the 1<sup>st</sup> and 3<sup>rd</sup> Respondents rely on the **principal legislation** namely the Trading Licenses Order.

It is submitted for 1<sup>st</sup> and 3<sup>rd</sup> Respondents that the principal legislation, would be the appropriate law to be applied.”

[16] The attorney for the Respondent contends that save for the 2<sup>nd</sup> Respondent, 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent’s state that none of the violations complained of by the Applicant has been directly attributed to them as individuals and implore this court, in the absence of such evidence to accept their position as a lawful one.

### **The court’s analysis and conclusions thereon**



[17] Having considered the able arguments of the attorneys of the parties it is my considered view that the first port of call is a determination of the point I mentioned in paragraph [18] above as to what is the appropriate legislation in the resolution of this matter.

[18] The point raised by the Respondent is that Applicant does not seem to appreciate that it relies on a *regulation* in particular Regulation 28 whilst the 1<sup>st</sup> and 3<sup>rd</sup> Respondents rely on the principal legislation namely the Trading Licence Order.

[19] I have perused through the relevant legislation and I find that there is no conflict in the use of Regulation 28 in that this Regulation is that of the principal legislation, namely the Trading Licence Order there is no conflict at all in this matter. It is normally the case in legislation that a principal legislation gives rise to Regulations which deal with the practical effects of the principal legislation. Therefore, I hold that Mr. Jele for the Applicant is correct in his contention as advanced above.

[20] Now I proceed to deal with the merits of this dispute whether the Applicant has satisfied all the requirements of a final interdict.

[21] In this regard, I take refuge on legal authorities in this subject being the cases of *Daniel Dinabantu Khumalo vs Attorney General (unreported) Supreme Court Case No.31/2010; VIF Irrigation Farmers Association and Another (unreported) Supreme Court Case No.30/2000* and that of *Ntombi Maziya vs Thembinkosi Ndzimandze (unreported) Supreme Court Case No.2/2012*.

[22] In my assessment of what is averred by the Applicant's attorneys at paragraph 7.5.2 of his Heads of Arguments it has not been disputed by the Respondents and therefore the following points are common cause between parties:

*“2.5.2 It will be submitted on behalf of the Applicant that it has established a clear right on this matter and it is entitled to the order it seeks, only if it can also prove the other two requirements of the grant of an interdict which is final in nature. The Applicant is responsible for enforcement of the provisions of the Act and as well as the Public Health Act, 1969 which includes the general principles of promoting good health and welfare within the controlled area of the Mbabane urban area and specifically managing the Mbabane main bus rank. The Applicant also monitors every person selling fruits, vegetables and food within its controlled area to ensure that it complies with the Public Health (food hygiene) Regulations of 1973. All the businesses and/or business people carrying out these businesses are given permits and/or licences to trade at a designated place fit for such*

*purpose. These procedures apply to all people carrying on any business within the controlled area of Mbabane. That business has to be in a designated place and approved by the Applicant. A person, for example, cannot wake up and establish a bus rank within a street. A person cannot in terms of the law sell any fruits at any place except the main market and either specially demarcated places within the controlled area.”*

[23] I have also come to the considered view that on the facts averred the Applicant has proved the injury committed or reasonably apprehended as stated in the landmark case of *Setlogelo vs Setlogelo (supra)*. In this regard I am persuaded by the arguments of the Applicants in paragraph 7.6.2, 7.6.3, 2.6.4, 2.6.5, 2.6, 2.7 and 2.8 of the Heads of Arguments of the Applicant.

[24] Lastly, in my assessment of the arguments of the parties and I find that the Applicant has also proved the requirement of absence of alternative remedy. It is common cause that the Applicant has been trying to prevent the 1<sup>st</sup> to 5<sup>th</sup> Respondents from selling their wares at the Mbabane main bus rank without success as they are trading without any permits, and or licences in contravention of section 28 and 29 of the Act. In this regard I have considered the arguments of the Applicant at paragraph 2.10 and 2.11 of the Heads of Arguments of Mr. Jele for the Applicant and I agree *in toto* with what is averred therein.

[25] I wish to comment *en passant* that the Respondents ought to make appropriate applications for the required licences as they face criminal prosecution in continuing to trade without a licence.

[26] In the result, for the foregoing reasons the Application is granted in terms of the Notice of Motion.

**STANLEY B. MAPHALALA**  
**PRINCIPAL JUDGE**