



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 719/2013

In the matter between:

**COUNCILLOR NGANONO MANYATSI**

**Applicant**

And

**MUNICIPAL COUNCIL OF MBABANE**

**1<sup>st</sup> Respondent**

**PASTOR CHONG YONG KIM**

**2<sup>nd</sup> Respondent**

**AFRICA CONTINENT MISSION**

**3<sup>rd</sup> Respondent**

**Neutral citation:** *Councilor Nganono Manyatsi v Municipal Council of Mbabane & 2 Others (719/ 2013) [2014] SZHC 18 (21<sup>st</sup> February 2014)*

**Coram:** **M. Dlamini J.**

**Heard:** **9 August 2013**

**Delivered:** **21<sup>st</sup> February 2014**

*Locus standi – member of municipality suing municipality – no locus standi as decision of municipality are taken by majority vote as per section 18 of Urban Act.*

Summary: On notice of application, the applicant seeks for an interim order, interdicting respondents from carrying on with construction work at a plot described as Plot No.2629 Mahwalala Zone 6 pending compliance of undertaking made by 1<sup>st</sup> respondent. Applicant prays in the alternative for a declaratory order to the effect that the on-going construction at Plot 2629 Mahwalala Zone 6 is unlawful as it contravenes the Urban Government Act 1969 (the Act) and or the Mbabane Town Planning Scheme 1998.

### The Parties

[1] The applicant has defined himself as:

- “1. I am an adult Swazi male residing in Mbabane, District of Hhohho.*
- 2. The facts deposed to herein are within my personal knowledge and I believe them to be true and correct.*
- 3. I am an elected COUNCILLOR representing several constituencies within the MUNICIPAL COUNCIL OF MBABANE including the residents of Mahwalala Zone 6. By law, I am duly authorised to pursue the welfare of my constituency not only within the 1<sup>st</sup> Respondent but also in other legal forums especially in cases where the 1<sup>st</sup> Respondent is not complying with the law or legitimate expectations.”*

[2] The respondents are:

- “4. The 1<sup>st</sup> Respondent is the Municipal Council of Mbabane, established as such in accordance with the URBAN GOVERNMENT ACT, 1969, with its principal place of business in Mbabane, District of Hhohho.*

5. *The 2<sup>nd</sup> Respondent is PASTOR CHONG YONG KIM, an adult male person cited herein in his capacity as Director / or Chairman of the 3<sup>rd</sup> respondent herein, residing at Mbabane District of Hhohho.*
6. *The 3<sup>rd</sup> Respondent is AFRICA CONTINENT MISSION, a non-profit institution established as such in accordance with the laws of the Kingdom of Swaziland, having its principal place of business at Mahwalala Zone 6, Mbabane, District of Hhohho.”*

### Applicant's case

[3] The basis for the application is well outlined in the founding affidavit as follows:

#### BACKGROUND TO THE APPLICATION

- “8.1 *The 3<sup>rd</sup> Respondent conducts a private learning institution at Zone 6, Mahwalala area, an area which falls under the jurisdiction of the 1<sup>st</sup> Respondent.*
- 8.2 *Though the 3<sup>rd</sup> Respondent pledged to construct and operate a community school at Mahwalala area, this has since changed and the 3<sup>rd</sup> Respondent is now strictly operating as a private institution. This is so because none of the community members is involved in the administration, management, determination of school fees and other incidental matters in the affairs of the 3<sup>rd</sup> Respondent.*
- 8.3 *During or around the year 1999, an application was made by the 3<sup>rd</sup> Respondent to establish a community school at Mahwalala Zone 6 area. This application was made to the Hhohho Regional Education Advisory Board and a copy of this application is attached hereto and marked as “MM1”.*

- 8.4 *In this application, the 3<sup>rd</sup> Respondent is designated as the applicant and the name of the school is designated as “MAHWALALA ZONE 6 COMMUNITY SCHOOL.”*
- 8.5 *Over the years and/or upon granting of the permission to establish this school, the name of the school was somehow changed to “SAIM CHRISTIAN HIGH SCHOOL.”*
- 8.6 *The management, formulation of polity and rules of the SAIM CHRISTIAN HIGH SCHOOL lies entirely with the 2<sup>nd</sup> Respondent herein and it is no longer a community school as initially intended by the community.*
- 8.7 *The area known as Mahwalala Zone 6 is still an informal settlement which is under development. The residents have been allocated plots but there are no title deeds yet. Processes are still underway to have the residents issued with title deeds upon payment of a certain minimal fee. Consequently, the piece of land under dispute herein has no title yet but the community as the lawful settlers or possessor has a claim to it just like the other plots within the community.*

9. *THE PRESENT APPLICATION*

- 9.1 *The 3<sup>rd</sup> Respondent is making a claim as owner of PLOT NO. 2629 situate in Zone 6 is adjacent to the land already occupied by the 3<sup>rd</sup> Respondent herein. As may be seen from annexure “MM 2” attached hereto, the 3<sup>rd</sup> Respondent already occupies a vast piece of land which it obtained under the pretext that it was building a community school. The 3<sup>rd</sup> Respondent is not only owning the vast piece of land shown in annexure “MM 2” but it also owns other vast piece of land in which it constructed a Church and also a University.*
- 9.2 *I must add that there is nothing wrong per se with the 3<sup>rd</sup> Respondent acquiring such huge pieces of land at no price or minimum prices but the problem is that this land is being acquired by the 3<sup>rd</sup> Respondent at the*

*expense of community members and their offspring who are without land. These vast pieces of land are being acquired by the 3<sup>rd</sup> Respondent at no cost or minimal costs yet the intention is to set up business ventures that will only profit the 3<sup>rd</sup> Respondent.*

9.3 *To give an example, the school which was initially set up as a community school, namely SAIM CHRISTIAN HIGH SCHOOL, now charges each child enrolled for matric a sum of not less than E15,000.00 per annum. A child enrolled other than matric pays not less than E7,000.00 per annum. Very few members of the community can afford such an amount and, in fact most of the children now enrolled in this school come from rich or affluent parents who are not from this community.*

9.4 *The piece of land in question, namely PLOT 2629 is contested as a number of stakeholders are making a claim to it. These stakeholders include the youth of the area as well as a Mtsetfwa family residing near the plot in question. These stakeholders have come to me as a Councillor and registered their claims to me as a person representing various interests and people within the community.*

9.5 *In turn, I advised these people to write a letter to the 1<sup>st</sup> Respondent and register their complaints and I also undertook to table my constituency's concerns within the 1<sup>st</sup> Respondent's structures.*

9.6 *When the concerns reached 1<sup>st</sup> Respondent, the latter in turn positively responded, and in particular stated that the concerns were being dealt with by the Ministry of Housing and Urban Development.*

9.7 *On the 24<sup>th</sup> April 2013 the 1<sup>st</sup> Respondent wrote to the Mahwalala Youth in Zone 6 and stated that; "in response to the issues raised in your letters to Council, which will be finally decided upon by the Honourable Minister of Housing and Urban Development regarding the issue of the total land area allocated to Saim Christial High School and how it will finally affect the homesteads and playground in the area." A copy of*

*this letter from the 1<sup>st</sup> Respondent is attached hereto and marked “MM 3”.*

- 9.8 *The Minister of Housing and Urban has not yet responded to the concerns as indicated by the 1<sup>st</sup> Respondent.*
- 9.9 *During or around the beginning of May,2013, the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent began processes of digging foundations on the disputed area in readiness to commence some construction, the nature of which is presently unknown to me.*
- 9.10 *Upon my enquiry from the Chief Executive Officer of the 1<sup>st</sup> Respondent on how this could happen as the affected parties are still waiting for a response from the Minister, I could not get a clear answer from the former.*
- 9.11 *It is also to be noted that the area in which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are digging foundations is an area which requires special consent from the 1<sup>st</sup> Respondent in terms of the Mbabane Town Planning Scheme 1998 as well as the Urban Government Act 1969.*
- 9.12 *The Mbabane Town Planning Scheme 1998 requires that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should have put up notices for the buildings they intent to put up in the land in question so that any person or parties objecting to the proposed construction taking place can lodge their objections accordingly. This is in accordance with schedule 4.3 and 4.4 of the Mbabane Town Planning Scheme of 1998.*
- 9.13 *The on-going construction initiated by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is therefore unlawful and contravenes the Mbabane Town Planning Scheme, 1998 in that*

- *The land in question is a designated zone falling within the head of Table No.1 under schedule 4.3 of the Town Planning Scheme of 1998.*
- *No application for special consent was made and obtained by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prior instituting the construction as above outlined.*
- *No NOTICE was issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prior to initiating the construction at the stated place thereby effectively depriving any interested party to object accordingly as required by law and/or in accordance with schedule 4.4 of the Town Planning Scheme of 1998.”*

[4] An affidavit by one member of Mtsetfwa supporting applicant was filed.

Respondents’ answer

[5] On the hearing date, the court was urged to decide on the *points in limine* raised on behalf of respondents. These were as follows:

*“LOCUS STANDI*

4.1.1 *I am advised and verily believe that the Applicant has no legal standing to institute this Application as he is not directly affected by the construction on Plot 2629 by the Third Respondent. The Applicant is not an owner or occupant of Plot 2629 and therefore has no legal interest with what goes on in it.*

4,1,2 *I am advised and verily believe that the fact that Applicant is a Councillor of the First Respondent representing the people of Mbabane West, which include residents of Mahwalala Zone 6 does not entitle him to institute proceedings on behalf of those people he represent in the City Council of Mbabane. Further*

*and fuller submissions in this regard shall be made during the hearing of the matter.*

NON JOINDER

4.2 *I am advised and verily believe that the Applicant has failed to join the Ministry of Housing and Urban Development or the Swaziland National Housing Board in this application which is the Ministry and Board responsible for overseeing issues of land allocation at Mahwalala area.*

4.2.1 *The Ministry of Housing and Urban Development through the Swaziland National Housing Board allocated Plot 2629 to the Third Respondent for the construction of the school as reflected in annexure “ACM1” hereto attached. The Ministry represented the Swaziland Government who is the rightful owner of the land in question. I am advised therefore, that the Ministry of Housing and Urban Development and the Swaziland National Housing Board are necessary parties in these proceedings and ought to have been joined as parties.”*

[6] Two other points were raised from the bar during submission. It was stated that the applicant as a member of 1<sup>st</sup> respondent could not institute the present application as his function and duties are proscribed under the Act that appointed him to the office. His application was *ultra vires* the Act.

[7] Further to allow applicant to bring the present application when he is a member of the 1<sup>st</sup> respondent is tantamount to applicant suing himself, an untenable circumstance under law.



## Adjudication

### Locus standi

[8] The applicant in reply attest that as an elected member of Zone 6 Mahwalala, he represents his community on a number of issues arising and therefore is not precluded by law to bring the present application.

[9] It is not in issue that the applicant has found his way to the 1<sup>st</sup> respondent through the electorate of his constituency, Mahwalala Zone 6 being a portion of it.

[10] It is clear that when applicant was elected by his constituency it was pursuant to the Urban Government Act. No.8 of 1969 as amended by Act No.3 of 2001 (the Act). In the result, applicant's powers emanate from the said Act. One therefore needs to scrutinize the said Act in order to ascertain whether applicant is entitled to bring the present application.

[11] Section 9 of the Act reads:

#### *“Acceptance of office*

9. *A person elected or appointed a councilor shall, prior to the first meeting of the Council which he attends after his election or appointment, sign and deliver to the Town Clerk a declaration in a prescribed form that he accepts the office of the Councillor and will faithfully perform the duties thereof.”*

[12] The duties are prescribed under section 5 as follows:

*“Municipal or Town Councils*

5 (1) *In every municipality there shall be constituted by the Minister, by notice published in the Gazette, a municipal or Town Council which shall perform such duties and may exercise such powers as are imposed or conferred on Council by this or any other law, and it shall generally assist in the maintenance of order and good government, within the area of its authority.”*

[13] It is correct, as advanced on behalf of applicant, that the spirit of election is that the overall winner shall represent the aspiration and wishes of his constituency. The winner is the voice of the electorate in Council. However, this voice must be heard within the ambit of the applicant’s enabling legislation.

[14] Section 18 of the Act outlines the mechanism to be employed when Council is deliberating on its business. The business of Council may include the wishes and aspiration of the electorate. Section 18 reads:

*“Quorum for and voting at meetings.*

18(1) *At any meeting of a Council, one-half of the total membership of the Council shall constitute a quorum for the transaction of business.*

(2) *All acts of a Council and all questions and matters coming before a Council for decision shall be done or decided by a majority of the councilors present.”*

[15] The effect of section 18 is that in as much as each elected member of Council is mandated and expected to table the wishes and aspiration of his constituency which translate to the “*business,*” this “*business*” is only implemented once a collective voice gives accent to it. This collective

voice can only be attained through the mechanism outlined under section 18 of the Act. The rationale behind this process was eloquently stated by **Jacob J.** in **Mec. Development Planning and Local Government v Democratic Party 1998 (4) S. A. 1157 at 1179 D-E** as follows:

*“Indeed, the prescribed mechanism is necessary. Without it, a minority in the municipal council could quite easily hold the majority to ransom...”*

[16] The learned judge proceeded to highlight that to allow the decision of the minority would frustrate the business of municipal council. I must add that that same democratic process which ushered applicant into municipal council is the very mechanism which applicant must conform to in order to achieve the mandate of his constituency. This mandate, I must hasten to point out, must be in line with the business of 1<sup>st</sup> Respondent as outlined in section 55 of the Act. It is apposite to add that an astute Councillor will know that in order to win majority vote within Council, prior lobbying should be part of the game. These are democratic processes which accord well in democratic societies.

[17] In the absence of any allegation of malice, applicant cannot challenge a decision taken in good faith by the municipal council. In the circumstances of this case, applicant lacks *locus standi* against the 1<sup>st</sup> respondent. It follows that in the light of the orders sought as Councillor, he cannot institute legal proceedings against 2<sup>nd</sup> and 3<sup>rd</sup> respondents who are members of his constituency in favour of another member. Not only is this untenable in law, it is contrary to the very democratic process which brought him to be a member of 1<sup>st</sup> respondent.

[18] In the light of the above, it is unnecessary to adjudicate on the question of non-joinder of the Ministry of Housing and Urban Development.

[19] In the above premise, I make the following orders:

1. Applicant's application is dismissed;
2. Costs to follow the events.

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

**For Applicant** : **B. S. Dlamini**  
**For 1<sup>st</sup> Respondent** : **B. Ngcamphalala**  
**For 2<sup>nd</sup> & 3<sup>rd</sup> Respondents:** **S. Bhembe**