



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1733/2023

In the matter between:

MADUDUZA GABRIEL ZWANE NO

1st Applicant

SIMO VELIBANTI DLAMINI NO

2nd Applicant

And

MINISTER OF HOUSING AND URBAN

1st Respondent

DEVELOPMENT

MPUMELELO CYPRIAN SHONGWE

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Neutral Citation: *Maduduza Gabriel Zwane NO & Another v Minister of Housing and Urban Development & 2 Others (1733/23) [2023] SZHC 243 (01 September 2023)*

CORAM: **MABUZA PJ**

DATE HEARD: **01/08/23**

DATE DELIVERED: **01/09/23**

Summary

Municipality governance: The Applicants herein are challenging the appointment of the 2nd Respondent by the First Respondent.

Held: That the Minister is empowered by Section 7 (1) of the Urban Government Act, 1969 to appoint the 2nd Responded

JUDGMENT

Q.M. MABUZA PJ

Application

[1] By urgent Notice of Motion dated 19/07/23 the Applicants came before this Court for an order in the following terms:-

1. Dispensing with the normal requirements relating to time limits, manner and form of service as provided for in the rules of the above Honourable Court and treating this matter as an urgent one.
2. Condoning the Applicant's none-compliance with the rules of the above Honourable Court.
3. Interdicting the First Respondent and all those acting at his behest or in concert with him from proceeding with the swearing in and inauguration of the Second Respondent as a councillor for Hlathikhulu Town Board pending finalization of this matter.
4. That a rule nisi operating with immediate and interim effect do hereby issue calling upon the Respondents to show cause, if any, on a date to be determined by the above Honourable Court, why;
 - 4.1 The First Respondent's decision to appoint the Second Respondent as a councillor for Hlathikhulu Town Board should not be reviewed, corrected and/or set aside.
 - 4.2 The Second Respondent's appointment as a councillor for Hlathikhulu Town Board should not be declared unlawful and set aside.
5. That the First Respondent be ordered to transmit to the Registrar of the above Honourable Court the full record of the proceedings, if any, which culminated in his decision to appoint the Second Applicant as a councillor for Hlathikhulu Town Board, together with

his reasons for his decision as he is in law required or desires to give.

6. Costs of suit against those Respondents who oppose this application.
7. Further and/or alternative relief.

[2] The motion is opposed by the Respondents per their notice dated 19/07/23.

[3] I granted the rule nisi sought and effectively stopped the swearing in of the 2nd Respondent pending finalization of this matter.

The Parties

[4] The First Applicant is Maduduza Zwane an adult Swazi male person of Hlathikhulu in the District of Shiselweni.

[5] The Second Applicant is an adult Swazi male person of Hlathikhulu in the District of Shiselweni.

[6] The First Respondent the Minister of Housing and Urban Development a minister of the Crown cited in his official capacity as such with powers to appoint councillors in all the towns and cities in the country.

[7] The Second Respondent is Mpumelelo Cyprian Shongwe an adult Swazi male person of Mbotjeni area in the District of Shiselweni.

Background

- [8] The material facts of this matter are common cause. The Honourable Minister of Housing and Urban Development purportedly acting in terms of the Urban Government Act of 1969 has appointed the Second Respondent into the Hlathikhulu Town Board for a period of five years.
- [9] It is this appointment that is being challenged by the two Applicants. The two Applicant are both members of the interim council in Hlathikhulu. They are holding the fort until new councillors are sworn in and inaugurated.
- [10] They were appointed by the Honourable Minister for a period of three months. They are both residents and property owners in Hlathikhulu. They stay within the town's boundary.

Applicants' Arguments

- [11] The Applicants state that they and other rate payers in Hlathikhulu are not happy about the Second Respondent's appointment into the board. They contend that he is not qualified to be part of the board, either through an appointment or election because;
- 9.1 he is not a resident of the town,
 - 9.2 he does not own any business in the town,
 - 9.3 he does not own any property within the town,
 - 9.4 he never registered for the recently concluded local government elections either because he knows that he does

not qualify or is just not interested in holding office in the town, and,

9.5 as a government employee, he does not have written authorization from his superiors at his workplace authorising him to be appointed or elected as councillor in the town board.

[12] The Applicants argue that the 2nd Respondent is disqualified in terms of Section 10 (1) (b) of the Act, that makes provision that a person is disqualified if that person:-

“holds an office of profit under the Government, unless he has the written approval of the head of the government department in which he is serving”

[13] The argument is that the 2nd Respondent does hold such office of profit in the government as a regional assistant officer.

[14] The Applicants argue further that by appointing the 2nd Respondent into the Council of Hlathikhulu Town Board, the Honourable Minister acted *ultra vires* his powers as the 2nd Respondent is not qualified or is disqualified to be part of Council in terms of the Act. For this reason, they contend that his appointment is liable to be set aside.

[15] They conclude by praying for an order in terms of their Notice of Motion.

Respondents' arguments

[16] It was argued by the Respondents that the answer to this case lay in the letter attached to the Replying Affidavit dated 12th July 2023 (**Annexure "A"**). The contents are reproduced hereunder:-

"12th July 2023

*The Honourable Minister
Ministry of Housing and Urban Development
P.O. Box 1832
Mbabane*

Dear Honourable Minister,

Re: Appointment of Board member

The Hlathikhulu Town Board hereby acknowledges receipt of communication regarding appointment of Mr. Cyrian Shongwe into the Hlathikhulu Town Board. Mr. Cyprian Shongwe is an appointee of the Honourable Minister as per a list submitted to my office on the 11th July instant. As an Interim Board, we have concerns that we wish to humbly put through to the attention of the Honourable Minister of the Crown about this Appointee. Whilst we acknowledge points 1 and 2 below, we request that the Honourable Minister considers these concerns stated from a) below:-

- 1. We acknowledge the fact that it is the prerogative of the Minister to appoint Board members to join the elected members within the Town Board.*
- 2. The Minister as the legislation provides, may appoint any member to be part of the Town Board. We however request that the Honourable Minister consider the following:-*
 - a) The four elected Board members are not rate payers, two of whom are occupiers and the other two are business people. This, in simple terms, is to say that the four do not have properties in Hlathikhulu.*
 - b) We had hoped that the minister would complement that shortfall by appointing an individual who will represent the rate payers. The current appointee is neither a property owner nor an occupier nor a business person, and to exacerbate this concern, he does not even reside within the boundaries of the town.*
 - c) Furthermore, it was gathered from the Town Clerk that back in August last year, the Honourable Minister had requested that he be provided with candidates for the interim Board that will make it easy for him to choose from them when making appointments into the next Board, for ease of hand over and seamless transition to the next term of office.*

Unfortunately, the current appointee does not qualify in this declaration as stated by the Honourable Minister.

- d) Lastly, the appointed member is employed by His Majesty's Government responsible for the smooth running of the Swazi Courts as a Court Messenger and on top of that he is the Indvuna of the KoNtshingila Royal Kraal which makes him quite a busy man because he has to take care of very important responsibilities of the two crucial institutions. We believe adding a responsibility which is quite critical like the one-off being a Board Member may jeopardise his work in all these three so critical entities.*
- e) Further we are currently seized with conflicts regarding land in town allocated by the ko Ntshingila Royalty to different people. His impartiality will be compromised.*
- f) Our humble request therefore is that the Honourable Minister reconsiders his appointment for Hlathikhulu and appoint either of the two interim Board members since both are property owners or appoint anyone owning property in Hlathikhulu in order to complement the composition of the Board so that balance in the Board members is realised.*

This request is as per the dictates of the Urban Government Act of 1969 Section 6 (b) which gives the Honourable Minister authority to provide for the election or appointment of councillors in a municipality.

Thanking you in advance for your serious consideration of this noble prayer from the Interim Board Chair.

Warm regards

signed

Maduduza Zwane (Board Chairman)

- [17] Respondents referenced paragraph 2 and 2 (f) of that letter, in which the Applicants acknowledge the power of the Minister to appoint any member to be a part of the town board and them requesting the Minister to appoint of them.

- [18] The Applicants are trying their luck to be appointed into council by moving this application when the enabling statute is clear that the appointments to be made by the Minister are not in the same category as those meant to be elected by the Residents. Those elected require to be owners or occupiers of properties and or carrying on business in the urban area for a period not less than 6 months.
- [19] In as much as Section 10 (1) (b) of the Urban Government Act require that an appointed or elected member should have a written approval from a government department he is under, if he is a civil servant and it being admitted that Mr Shongwe is a civil servant as a regional assistant officer (an office held not for profit) it is submitted that at the time of initiating or responding to the application, he did not have such letter but he is now in possession of same. It will be filed over the bar.
- [20] It is worthy to mention that such letter is supposed to be presented to the Town Clerk in terms of Section 9 when he is taking his Oath of Office and not prior to this appointment. How would one know he will be appointed such that he is required to get a letter of approval before the appointment is published? In any event such a letter is not required because there is no evidence that the office Mr Shongwe is held for profit. A salary cannot be said to be profit thus Section 10 of the Act must be given a restrictive interpretation because a salary is derived from work done at the behest of an employer per work that he allocates you, whilst profit is an accounting principle that is derived from enjoying the excess fruits of your business after settling all expenses pursuant to balancing your books of accounts.

- [21] The appointment of a councillor by a Minister is founded on the principle of Section 7 (1) (a) of the Urban Government Act and it is clear from the entire reading of the Act that the qualification requirement that is prescribed for elected councillors is not applicable to appointed councillors.
- [22] Section 7 (3) provides that the Minister must fill a vacant space of an elected councillor with one who meets the requirements of elected councillors as provided in terms of Regulation 3 of the Regulations. This is not so in the case of appointed councillors.
- [23] If there is a doubt one must read Section 11 (3) and (4) which makes it clear that in the case of a casual vacancy, those positions held by the elected councillors should be filled by those qualifying as such, whilst those appointed are not bound by the Election Regulations promulgated in terms of Section 8 of the enabling Act.
- [24] The Applicants in their Heads of Argument are basically asking the Honourable Court to legislate. The Honourable Court despite its inherent jurisdiction does not have power to legislate as that is in realm of parliament.
- [25] *“Rules of interpretation do not override the language of a statute where the language is clear: they are only guides to enable us to understand what is inferential. In each case the Act of parliament is all powerful, and when its meaning in unequivocally expressed the necessity for the Rule of construction disappears”* per Lord Bowen LJ in **Railway v Evans 1893 1**

(CH) 16; 27; 67 LT 639 cited by EA KELLAWAY, (1995), in *PRINCIPLES OF LEGAL INTERPRETATIONS*, (Statutes, Contracts & Wills) Butterworths page17.

[26] It is submitted that the sections dealing with appointed councillors do not create an absurdity that would compel the Honourable Court to read into the statute by adding that the appointed councillors by the Minister should be in the same category as those elected.

[27] The argument for **“reading in”** into a statute was argued most aptly on behalf of the Respondents. But as the Court has no intention of **“reading in”** into the Act nor **“severing”** any part of the Act, I shall skip the arguments relating to these issues even though they make scholarly reading.

[28] It was submitted that if the application would be upheld then, the Minister would be compelled to appoint even councillors that lost in elections for the particular Ward or town which may cause more strife. This will inhibit the powers of the Minister to constitute the Council as provided in Section 6 of the Urban Government Act:-

“6. Composition of councils.

(1)The Minister may from time to time by notice publish in the Gazette

(a) prescribe the composition of a Council and the number of councillors;

(b) provide for the election or appointment of councillors;

(c) divide a municipality into territorial wards and vary the boundaries of any such ward;

(d) prescribe the number of councillors to be appointed or elected in respect of each ward;

(e) provide for the appointment or election from among the councillors of a Chairman of such Council and of a Vice-Chairman, including the method of any such election;

(f) subject to any regulation made under Section 8, prescribe the terms and conditions of office of councillors and the Chairman and the Vice-Chairman;

(g) provide in relation to a municipal or Town Council that the Chairman thereof and the Vice-Chairman shall be known by the title of mayor and deputy mayor respectively;

(h) except be known as a municipal or Town Council; and

(i) provide for any other matter not hereinbefore specified which may be necessary for the proper establishment of a Council.

(2) Where by a notice published under subsection (1) –

(a) the number of councillors prescribed to be elected exceeds the number of councillors to be appointed, the Minister shall provide for the Chairman and Vice-Chairman to be elected from among the councillors; and,

(b) the Minister has provided that a Council shall be known as a municipal Council, he shall provide for all the councillors to be elected and shall not thereafter vary the composition of the Council except –

(i) in terms of a request by the council; or,

(ii) where the Council has been dissolved as provided for in Section 107.”

[29] It was argued further that it could not be said that the purpose of the Act was for councillors who are resident or own properties in the urban area as provided by the Election Regulations because the Election Regulation as subordinate legislation was enacted by the Minister through Parliament and the qualifications of a candidate have been set by the Minister as seen in Section 8 (d) of the Urban Government Act.

[30] Even more interesting was the argument that Chapter XIII of the Constitution especially Section 219 (5) (read with Section 220), provide that **“local Government areas may be rural or urban or partly rural and partly urban”** thus the appointment of Mr Shongwe, a traditional leader

cannot be held to be unconstitutional, albeit the legislation to redefine local governments has not been enacted in terms of Section 218 of the Constitution. The Honourable Minister is on the path of harmonising the current local government act with the Constitution, whilst Parliament is lagging behind. The Applicants should be directing their energy to Parliament to enact this important piece of legislation.

[31] Further argument was that in any event as provided at Section 123 of the Urban Government Act, the Minister has a right to validate anything which may be irregularly done in terms of the Act, thus if the Honourable Court is inclined to grant the application, it is prayed that the Honourable Minister be given a chance to validate the error first.

[32] The Respondents end by praying that the application be dismissed with costs.

Conclusion by the Court

[33] The arguments set out above mirror the facts deposed to by the respective deponents.

[34] The First Respondent is empowered to appoint a counsellor into the board by Section 7 (1) of the Act which provides:-

“where by notice published under Section 6, provision is made –

(a) For the appointment of a chairman and vice chairman, or the appointment of councillors, any such appointment shall be made by the Minister by instrument in writing under his hand; ...

[35] The power that the First Respondent has, was not disputed by the Applicants.

[36] The arguments presented by respective learned Counsel are very sound. I did pose a rhetorical question to learned Counsel that if I granted the application this would effectively shut the door to any representation by people on the outskirts of the town who needed to access government facilities in the town, for example the hospitals, police, government offices, even the schools both public and private which are based in the town. The government subvents the town board with taxpayers' money it cannot be correct for people to be discriminated on the grounds that they do not own property or businesses in the town.

[37] In the same breath, it is not clear that Mr Shongwe has been appointed to serve the interests of those on the outskirts of the town. It would appear that he was just liked by the Minister and there is no clear criteria other than, Mr Shongwe has been selected on and what constituency he represents. So truly he represents himself only. We do not know what mandate was given to him when he was appointed. Perhaps it's time that there was transparency and accountability in such appointments.

[38] That having been said, the provision that I have set out above clearly gives the First Respondent the mandate to appoint the 2nd Respondent.

[39] My hands are tied. As learned Counsel for the Respondents pointed out, I can neither **“read in”** nor **“sever”** any portion of the Act that I find

offensive otherwise I would be overreaching into the domain of the legislature. I agree.

[40] Coming to the issue of costs. I asked learned Council how I could order costs against the Applicants if they lost as they were in office of the Town Board by courtesy of the First Respondent when they moved this application. Mr Simelane suggested that each party should be ordered to pay their own costs. The matter has greatly taxed my mind and my final thoughts on the matter was that a fair order would be for the Town Board to pay the costs of the Applicants but the Town Board was not cited as a party. It was not proved by the Respondents that the Applicants in bringing this application were frivolous nor that this was unnecessary litigation or that the Applicants simply being busy bodies or vexatious. At the time the application was brought the Applicants were appointed by the First Respondent.

[41] I issue the following orders(s):-

- (a) The *rule nisi* is discharged and the application dismissed.
- (b) The Respondents to pay their own costs; and
- (c) The costs for the Applicants are to be paid by the First and Third Respondents on the ordinary scale.


Q.M. MABUZA
PRINCIPAL JUDGE

For the Applicants: Mr B. C. Dlamini

For the Respondents: Mr M.E. Simelane