



**IN THE HIGH COURT OF ESWATINI**

HELD AT MBABANE

CIVIL CASE NO. 1724/2022

In the matter between

SAMUKELISO SHONGWE

APPLICANT

And

MBABANE MAGISTRATE SIFISO VILAKATI NO	1 <sup>ST</sup> RESPONDENT
SIFISO BHEMBE	2 <sup>ND</sup> RESPONDENT
VICTORIA BHEMBE	3 <sup>RD</sup> RESPONDENT
PATRICK BHEMBE	4 <sup>TH</sup> RESPONDENT
THE ATTORNEY GENERAL	5 <sup>TH</sup> RESPONDENT

Neutral citation: *Samkeliso Shongwe v Mbabane Magistrate Sifiso Vilakati NO & 4<sup>th</sup> Others (1724/22) [2023] SZHC 306 [2023] (1<sup>st</sup> November 2023).*

Coram : Tshabalala J

Heard : 13/10/2023

Delivered : 01/11/2023

*Summary: Practice and Procedure – peace-binding inquiry in terms of Section 341 of the Criminal Procedure and Evidence Act 67/1938 is neither a civil or criminal trial, but a quasi-judicial and administrative in nature. The magistrates order against the Applicant to return 3<sup>rd</sup> party's keys and maintenance of the elderly family matriarch was beyond the jurisdiction conferred on the magistrate by the said section.*

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### JUDGMENT

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- [1] The Applicant, launched an urgent application for *inter alia* review and setting aside of “*the ruling issued by His Worship, the 1<sup>st</sup> Respondent in favour of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents on the 7<sup>th</sup> day of September, 2022.*”<sup>1</sup>
- [2] The order of Mbabane Magistrate sought to be reviewed and set aside reads as follows:
- “1. Cusi Shongwe<sup>2</sup> ordered to release the key to the house in question to Alvinah Bhembe;
  2. The entire Bhembe family and relatives should ensure that Gogo is maintained and well taken [care] of;
  3. Respondents are ordered to identify a tenant to rent the house in question and proceeds of same should be utilized to maintain Gogo Alvinah Bhembe.

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<sup>1</sup> Prayer [2] of the Notice of Motion

<sup>2</sup> Samkelo Shongwe, the Applicant herein.

4. *The parties are further ordered to keep and maintain peace with each other at all times and refrain from conduct likely to cause a breach of peace.*
5. *The Royal Eswatini police are ordered to serve and further assist in its execution."*

[3] The order in question was issued in consequence of Peace Binding complaint filed by one Bahle Nxumalo, the complainant, in terms of Section 341 of the Criminal Procedure and Evidence Act 1938 as amended (The Act). The complaint was lodged against the current 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The said Section 341 reads:

*"Binding over of persons to keep the peace*

341. (1) *If a complaint on oath is made to a Magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat was made in a public or private place, such Magistrate may order such person to appear before him, and if necessary may cause him to be arrested and brought before him.*
- (2) *The Magistrate shall thereupon enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath, and may order the person*



*against whom the complaint is made to give recognisance with or without sureties in an amount not exceeding Fifty Rand for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.*

(3) *The Magistrate may, upon the enquiry, order the person against whom the complaint is made or the Complainant to pay the costs of and incidental to such enquiry.*

(4) *If any person after having been ordered to give recognisances under this section refuses or fails to do so, the Magistrate may order him to be committed to gaol for a period not exceeding one month unless such security is sooner found.*

(5) *If the conditions upon which the recognisances were given are not observed by, the person who gave them, the Magistrate may declare such recognisances to be forfeited and any such declaration of forfeiture shall have the effect of a judgment in a civil action in the Magistrate's court of the district."*

[4] The following facts which gave rise to the present application are common cause:

The Applicant and the Respondents are family members and descendants of Gogo Alvinah Bhembe, owner of the property at the centre of this family dispute. The Applicant is the grandson of Gogo Alvinah, the 2<sup>nd</sup> Respondent

Sifiso Bhembe is also grandson to Gogo and cousin of the Applicant. The 3<sup>rd</sup> Respondent, Victoria Bhembe is maternal aunt of the Applicant while the 4<sup>th</sup> Respondent Patrick Bhembe is the stepson of Gogo Alvinah and uncle to the Applicant. Bahle Nxumalo (not a party to this application) is Applicant's sibling.

- [5] Bahle's complaint to the Magistrate, from what is gathered from the papers was that the Respondents herein, were evicting, or threatened to evict her from a house on Gogo Alvinah's property. She was required to pay rent which the family used towards maintenance of the aged Gogo Alvinah. Complainant's gripe was that she could no longer afford to pay rent because she was unemployed. She believed she was entitled to occupy the house free of rent because she was authorized by the Applicant who previously occupied the house. It appears from the papers that the magistrate prior to issuing the impuned order gave the family time to deliberate on the matter, amongst themselves.
- [6] According to the Applicant, the family members were divided on the issue, as a result no consensus was reached at the time the parties reappeared before the magistrate. Some family members maintained that Bahle must pay rent failing that she must vacate the house to give way to a rent paying tenant.

#### **Parties' submissions**

- [7] It is argued on behalf of the Applicant who has been ordered by the magistrate to surrender the keys to the house in question to property owner, that the magistrate exceeded his powers and acted beyond the provisions of Section 341 of the Act. The Applicant submits that the orders made by the magistrate are not competent in that they are civil in nature.



- [8] The Respondents' submission is that the powers conferred by Section 341 are broad in nature. That the magistrate is empowered to make an order outside what the Complainant asked for, as long as the objective of the order is to keep the peace sought by the complainant.
- [9] Both the Applicant and the Respondents referred this court to High Court judgments dealing with similar issue, which clarify the jurisdiction of the court in exercising the powers conferred by Section 341. I totally agree with the exposition of the law in the two judgments I have been referred to.
- [10] In **Zwelakhe Nhleko v Magistrate Sebenzile Ndlela NO & Another**<sup>3</sup> the Applicant challenged the magistrate's order made against him for judicial separation from his wife and payment of monthly maintenance to support the wife. The order followed on a complaint lodged by Applicant's wife for a peace binding order in terms of the same Section 341 of the Act, on the ground that the Applicant subjected her to physical assaults. The Applicant's undisputed averments were that he was never given an opportunity to say anything on the issue of judicial separation from his wife nor to answer on the allegations made against him.

The court held that *"in performing his duties or functions under Section 341 of the Act, the magistrate does not sit as a civil or criminal court. It is more of an administrative function whose aim or objective is to keep or maintain peace in general. The proceedings are not a trial but an inquiry based on the complaint..."*

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<sup>3</sup> Zwelakhe Nhleko v Magistrate Sebenzile Ndlela NO (448/12) [2012] SZHC 197 (23 March 2012)

[11] In setting aside the magistrate's order, the court in Nhleko's case<sup>4</sup> noted that the proceedings before the magistrate were quasi-judicial or administrative, and therefore an order of judicial separation from board and bed and for maintenance was incompetent.

[12] In **Fana Balote Dlamini v Dumisa R Mazibuko NO & Another**<sup>5</sup> the Applicant sought *inter alia*, an order for review and setting aside an order made by the Manzini magistrate made under the auspices of the said Section 341 of the Act. The undisputed facts presented by the Applicant in support of his review application before the High Court were as follows, briefly stated:

Applicant was summoned and appeared before the magistrate, who told him that he was in receipt of a complaint by Applicant's estranged wife to the effect that the Applicant had removed a refrigerator from her house as well as disconnected electricity supply to the house. The Applicant tried to explain himself and the incident but the magistrate would hear none of it. The Applicant was ordered to restore electricity supply and to return the refrigerator with immediate effect. The Applicant did not comply with the order but sought to challenge it. However there was no record of the proceedings giving rise to the order. The Applicant was subsequently arraigned before the same magistrate for Contempt of Court. Again the magistrate would not hear any of his explanation, and summarily found him guilty of Contempt of Court and sentenced him to seven days imprisonment. Applicant was subsequently released by the magistrate without explanation before serving the term. This happened after launching of the review application.

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<sup>4</sup> Supra

<sup>5</sup> Fana Balote Dlamini v Dumisa R Mazibuko NO. and Another (140/2016) [2016] SZHC 121 (13 July 2016)



- [13] The court in Dlamini's case<sup>6</sup> reiterated its prior decision in Nhleko's case<sup>7</sup> that the court sitting in terms of Section 341 of the Act does not do so as civil or criminal court but a quasi-judicial or administrative functionary, whose objective is to maintain peace in general, based on the complaint before it. The court found in Dlamini's case that *"what the learned magistrate did on the 09 June 2016 was not a peace binding inquiry. There was further, no enquiry at all in as much as the Applicant was not heard on the issue or complaint against him..."*
- [14] In the case of **Gcinisizwe Mabuza v National Commissioner of Police & 3 Others**<sup>8</sup> the Plaintiff was summoned to appear before Manzini magistrate on a complaint lodged by his estranged wife, in terms of Section 341 of the Act. The magistrate ordered the Plaintiff and the complaint to go and reach agreement on their dispute over ownership of a car. On the return date the magistrate was irked by feedback that Plaintiff refused to co-operate in the negotiations. The magistrate ordered detention of the Plaintiff for 7 days for Contempt of Court. This court found that the magistrate exceeded the powers conferred by Section 341 of the Act at many levels. The learned magistrate misdirected himself as to his powers in respect of peace binding inquiries before him. Plaintiffs right to basic natural justice were disregarded.
- [15] *In casu* the Applicant was not afforded the opportunity to make representations prior to the order for him to surrender the house keys in his possession situated on his grandmother's property. The omission could have occurred because there was no civil trial but an inquiry for the securing of peace. The powers of the presiding officer over peace binding inquiry are spelled in the section.

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<sup>6</sup> Supra

<sup>7</sup> Supra

<sup>8</sup> Gcinisizwe Mabuza v Natcom & 3 Others (100/15) [SZHC 174] [2021] (30 September 2022)

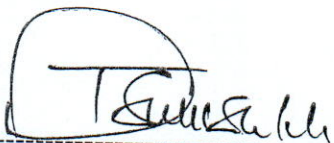


These may not be stretched to give rise to orders akin to outcome of civil proceedings. The court emphasised in Gcinisizwe Mabuza's case<sup>9</sup> that the court is obliged to hear parties to the complaint and thereafter issue an order that is within the confines of the section. It may be necessary for the court to improvise to address exigencies of a particular case. However any creativity in the orders made ought to be permissible in terms of the letter of the section<sup>10</sup>.

[16] There is no doubt that the learned magistrates order that is herein impuned came from a good heart to address, *inter alia* the plight of an elderly property owner whose up keep seemed to be compromised. It is however the view of this court that the orders made are incompetent under the peace binding inquiry that was before him. The court was sitting neither as a civil or a maintenance court.

[17] In the result the order of the 7<sup>th</sup> September 2022, (with the exception of a part to parties must keep and maintain peace), is reviewed and set aside.

[18] There is no order as to costs each party shall bear its own costs.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala  
Judge

*For Applicant: N. Mabuza – (Lucas BKS Dlamini Attorneys)*

*For 2-3<sup>rd</sup> Respondents: SM Maseko – (SM Maseko Attorneys)*

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<sup>9</sup> Supra

<sup>10</sup> See paragraph [26] Mabuza's case supra