



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1123/2023

In the matter between:

OZAPHI MNISI

FIRST APPLICANT

LOMAKHISIMUSI DLAMINI

SECOND APPLICANT

PHUMAPHI MNISI

THIRD APPLICANT

AND

NDIKUYABONA KUNENE

FIRST RESPONDENT

ROOTS CONSTRUCTION (PTY) LTD

SECOND RESPONDENT

MINISTRY OF HOUSING & URBAN

DEVELOPMENT

THIRD RESPONDENT

NATIONAL COMMISSIONER OF

POLICE

FOURTH RESPONDENT

ATTORNEY GENERAL

FIFTH RESPONDENT



Neutral citation : *Ozaphi Mnisi & Others v Ndukuyabo Kunene & 4 Others (1123/2023) [2024] SZHC 117 (18/09/2024)*

CORAM: B.S DLAMINI J

DATE HEARD: 26 July 2024

DATE DELIVERED 18 September 2024

Summary: Civil Procedure-Application for interdict-Applicants alleging that Respondents unlawfully interfering with their immovable property situate on Eswatini Nation Land. Respondents' filing opposition stating that the land in question was lawfully declared a township by the relevant authorities.

Held; The Respondent's points in limine are upheld with the results that Applicant's application is dismissed with costs.

JUDGMENT



INTRODUCTION

[1] On or around the 23rd May 2023, the Applicants brought an application to this Court under a certificate of urgency and sought to be granted the following orders;

“(1) Dispensing with the normal forms and time limits provided for in the Rules of Court and hear [sic] this matter on a basis of urgency.

(2) That the Applicant’s non-compliance with the above said forms and service be condoned [sic].

(3) That a rule nisi be issued with immediate effect and interim effect calling upon the Respondents to show cause on a date to be appointed by this Honourable Court why an order in the following terms should not be made final;

3.1 That the Respondents and others who will act on their behest, be interdicted and restrained from conducting construction works at Applicants’ property at Buhleni.



3.2 That 4th Respondent, through the Police Service, assist the Deputy Sheriff in ensuring that order 3 above is enforced.

(4) Costs of suit.

(5) Further and/or alternative relief.”

[2] On the 26th May 2023, His Lordship, Justice T. Dlamini granted a *rule nisi* effectively interdicting the First to Third Respondents from conducting any construction works on the land in question pending finalization of the matter in Court. I subsequently inherited the matter in the contested motion roll of the 16th February 2024. This means, for a good eight or nine months, the matter was lying dormant somewhere within the Court system.

[3] According to the Founding Affidavit deposed to by the First Applicant, one Ozaphi Mnisi, all the Applicants are residing at Buhleni area in the District of Hhohho and they are all siblings. It is stated by the Applicants that during or around the 15th May 2023, the First Respondent, in the company of the Second Respondent, came to

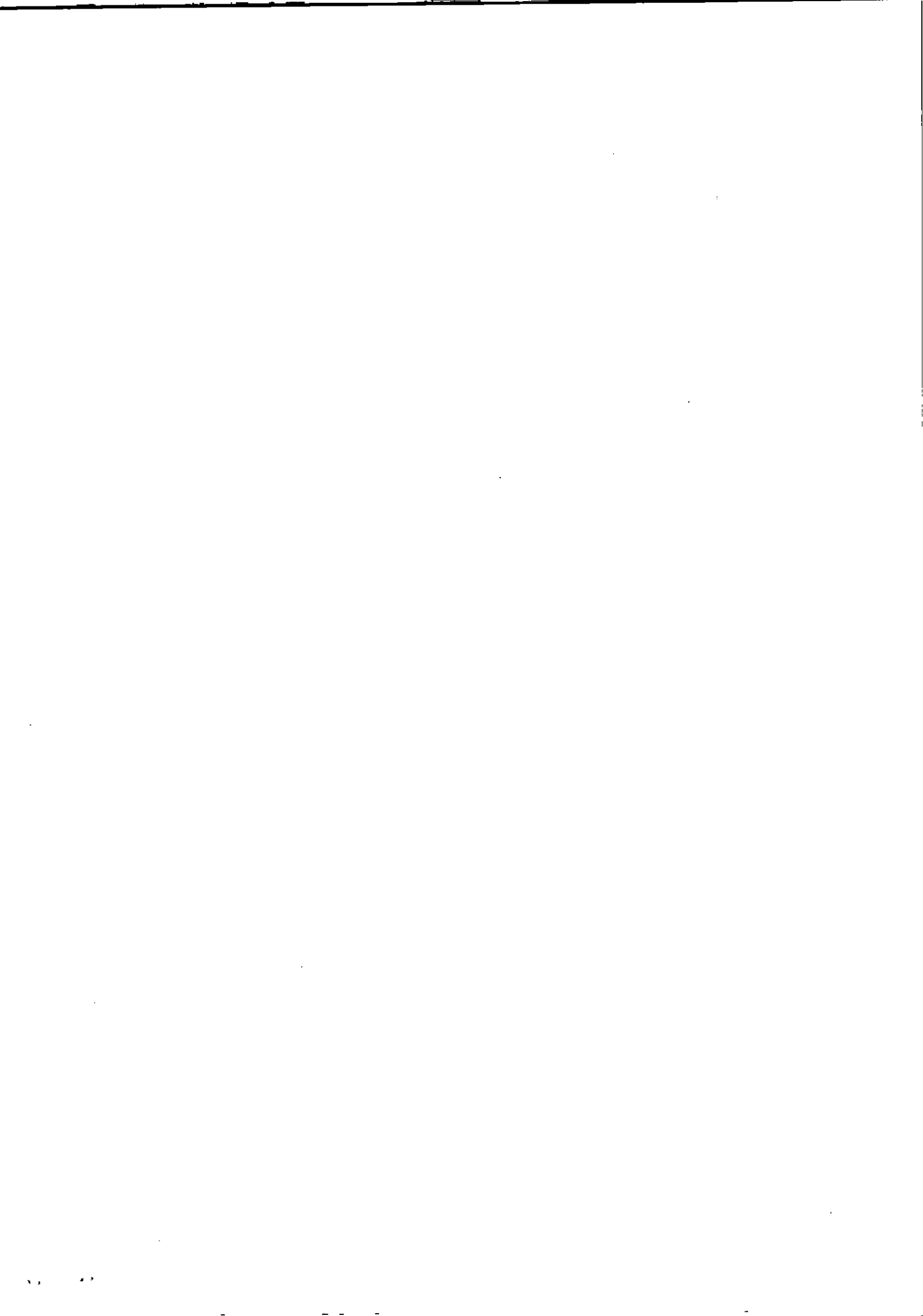


their piece of property which is in their possession and removed the fence and proceeded to conduct excavation works on the said property.

[4] It is further stated by the Applicants in their Founding Affidavit that;

“[17] When the 1st Respondent, who is unknown to us, was asked why he was trespassing with the 2nd Respondent, his response was that he had been instructed by the development board as its representative at Buhleni to do what they were doing i.e to remove and destroy fence surrounding the property, and conduct construction works on the property.

[18] The 1st Respondent further stated that if we had a problem with the construction works on our property, we should consult the development board at Buhleni and the 2nd Respondent since he was nothing but a Messenger, given the responsibility to be the link between the business people of Buhleni and the Ministry of Housing.



[23] It is my statement that I and my family are the lawful possessors of the land in question or property upon which the Respondents have trespassed. (I attach copies of the King's consent documents marked "OM 2" in the name of our late father, Josiah Mnisi)."

[5] In response to Applicants' application, the office of the Attorney General, acting on behalf of the Respondents filed an Answering Affidavit and also raised two points of law as follows;

"1. The right to the land in question situated at Buhleni town is said to belong to Josiah Mnisi who is deceased. None of the Applicants are possessed of Letters of Administration in order to represent an estate thus they are not clothed with *locus standi* to apply for an interdict.

2. Legal Notice 272/2021 declares Buhleni a town. The Applicants have not averred that they challenged the urbanization of the area which is now run by a Town Board thus they cannot be heard that they are entitled to the

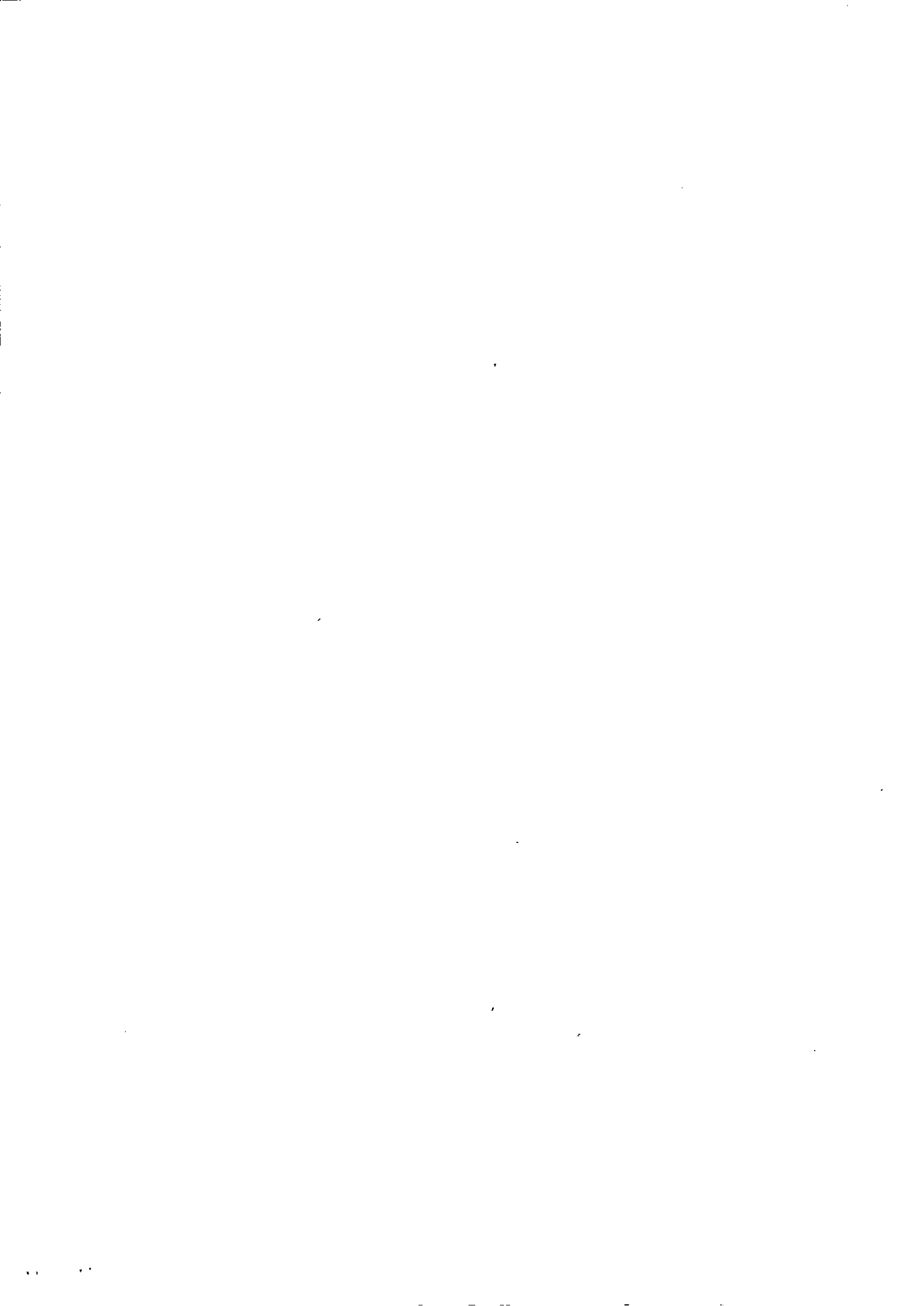


prayers they seek. A copy of the said Legal Notice is attached marked "A".

[6] On the merits of the matter, the third Respondent denies that it encroached on property belonging to Applicants' family. It is stated by the Principal Secretary of the third Respondent that;

"The halt of the construction was intended for a different case altogether that has to do with recycling business. It should be noted that the Order does not state that the land belongs to the Mnisi's nor does it declare them the owners of the land. They are just occupants. The Court never ordered the halt of the expropriation of the piece of land in question."

[7] It appears to be common cause that the parties in this matter have been engaged in various litigation against each other in the past and prior to the present proceedings. In one of the cases, this Court issued orders stopping the Third Respondent (then Fourth Respondent) and others from interfering with the rights of possession of the Applicants over the property described in that process. What must be clear though is that all the past cases were brought to Court around the year 2015.



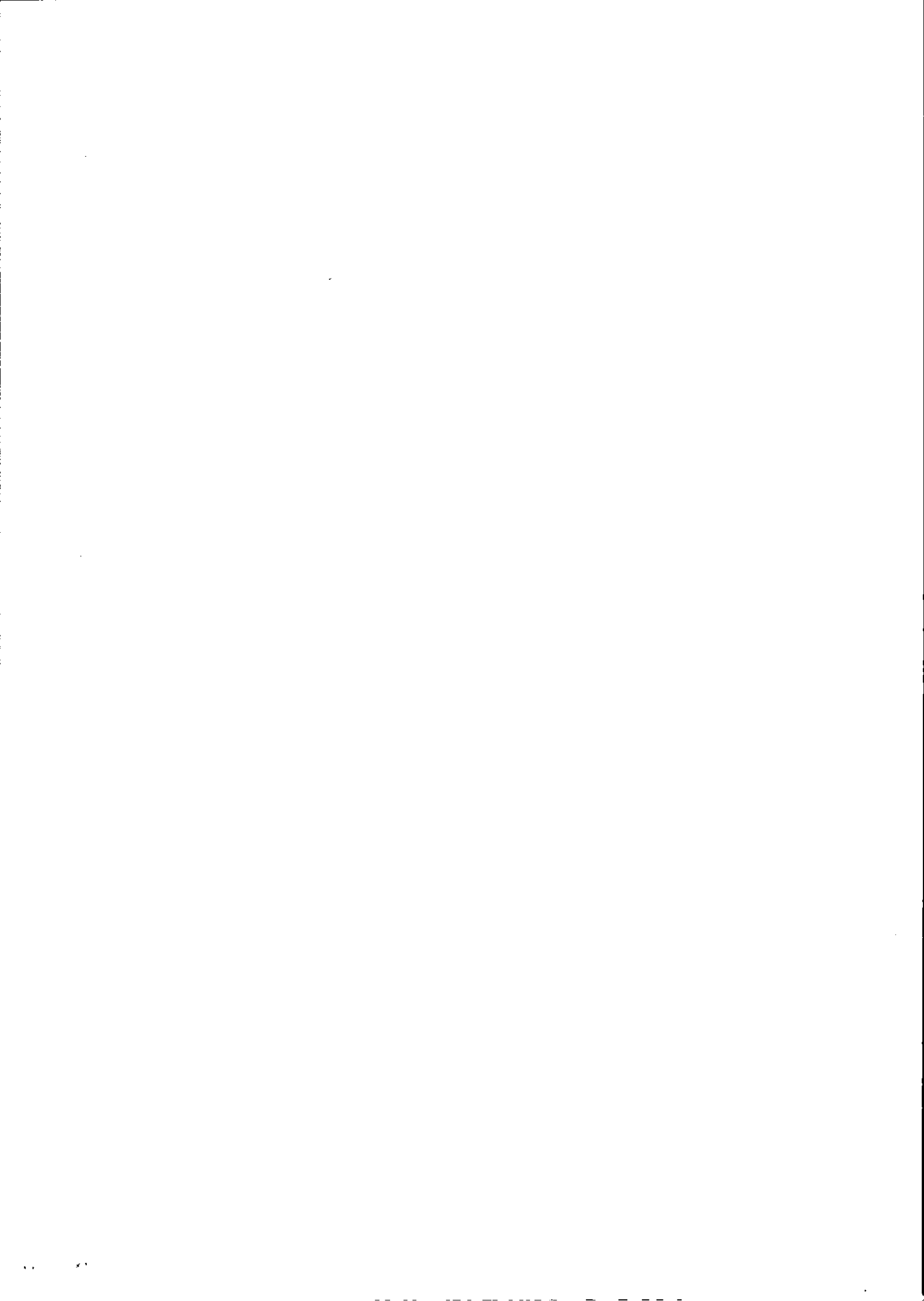
APPLICANTS' SUBMISSIONS

[8] In the opening paragraphs of their written submissions, the Applicants argue that;

“1.1 it is common cause that:

- (i) In the year 2015, the Applicants obtained an order against the 3rd Respondent and others, interdicting them from taking possession of the same land which is the subject of these proceedings.**
- (ii) The said piece of land was allocated to the applicants' father, Josiah Mnisi for business purposes.**
- (iii) The 3rd Respondent has been given the mandate to develop the area and upgrade it to a township...”**

[9] The Applicants argued that the third Respondent has made a ‘bare denial’ on the critical issues, namely, on the question of whether or not Applicants were in lawful possession of the piece of land when the alleged excavation were commenced on their property. The Applicants have also placed heavy reliance on the previous order which declared that third Respondent must restore possession to them as lawful occupiers of the property in question. In their written heads



and oral submissions, the Applicants did not do much in contesting the points *in limine* raised on behalf of the Respondents.

RESPONDENTS' SUBMISSIONS

[10] On behalf of the Respondents, It was submitted that Applicants have not established a clear right to the relief sought. It is stated on behalf of the Respondents that;

“[8] At paragraph 11 of the Founding Affidavit the Applicant states that the right to acquire the land was given to their late father Josiah Mnisi but none of the Applicants are in possession of Letters of Administration granted by the Master of the High Court in terms of section 22 of the Administration of Estates Act 1902.

[12] In as much as the Applicants claim that the right to the land belongs to an estate, they bring to the court's attention that the property adjacent to them has been subdivided into plots in fulfilment of stabling a town.



[13] The part where the Applicants are situate at Buhleni is not under a chief as [there is] now a town as per the Legal Notice 272/2021 attached to the Respondent's points of law. The Applicants did not challenge paragraph 16 and 17 of the Answering Affidavit found at page 27 which places the area in an urban area."

ANALYSIS AND FINDINGS

[11] The Urban Government Act No.8 of 1969 provides in Section 4 that;

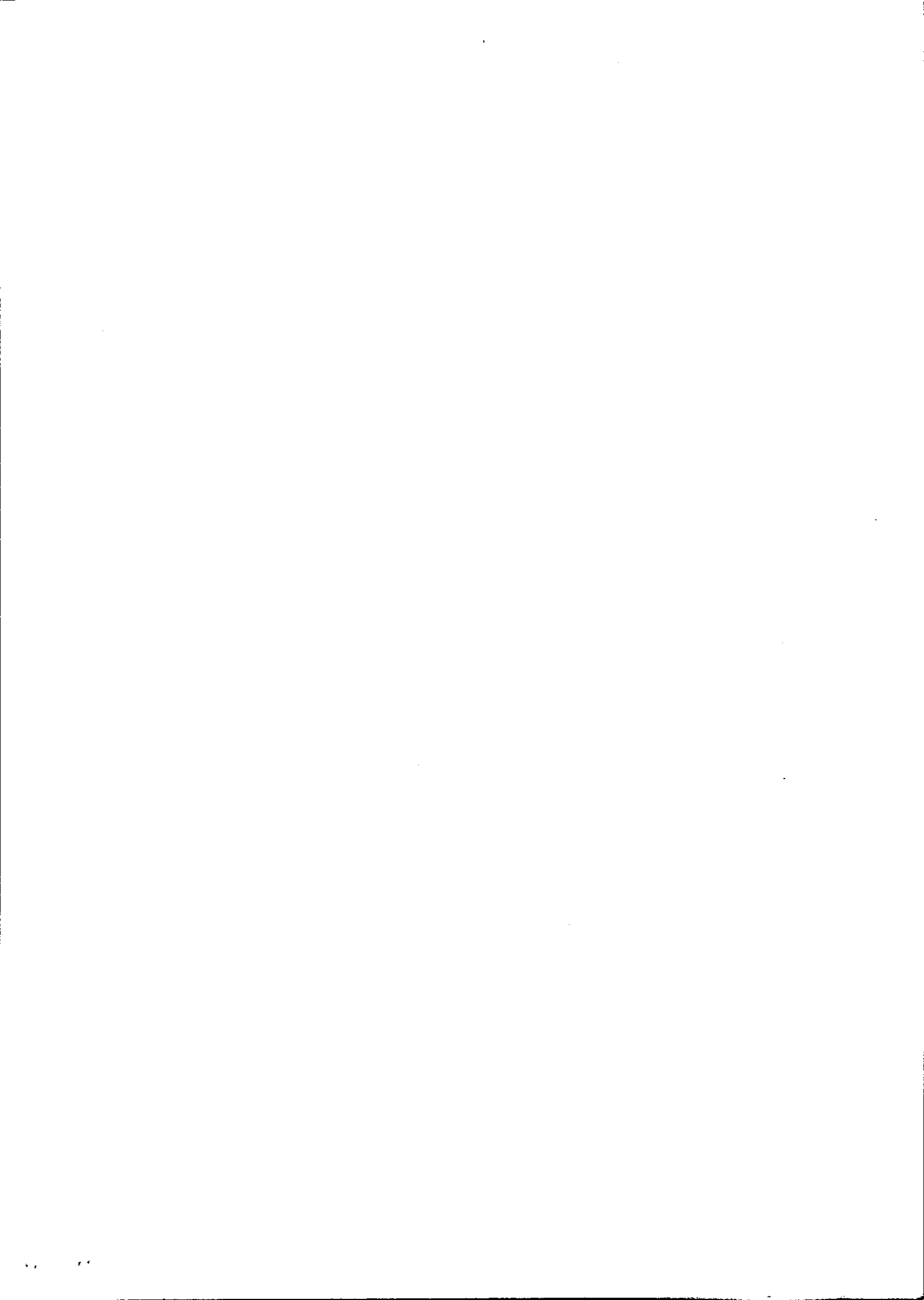
"[1]. Subject to the provisions of this section the Minister [Housing and Urban Development) may by notice in the Gazette-

(a) Declare any area to be a municipality;

(b) Assign a name to and after the name of the municipality;

(c) Define the boundaries of any municipality and alter such boundaries; and;

(d) Declare any area shall become a municipality.



[2] The Minister shall not publish a notice under subsection (1) without first-

(a) a notification in the Gazette and a newspaper circulating in the area concerned advising the public of the details of the notice he intends to publish and the reasons thereof, and inviting any person to submit any representations he may wish to make to the Minister by a time to be specified in such notification and;

(b) considering any representations made in response to the notification published under paragraph (a) and, where a commission has been appointed under subsection (3) , the report of that commission..."

[12] In page 2, item (iii) of their heads of argument, the Applicants are aware that the Minister was acting in terms of the powers conferred on him by Section 4 of the Urban Government Act, No.8 of 1969 when



he declared Buhleni area as a town or municipality. In this regard, the Applicants in the said paragraph assert that;

“The 3rd Respondent (Ministry of Housing and Urban Development) has been given the mandate to develop the area and upgrade it to a township.”

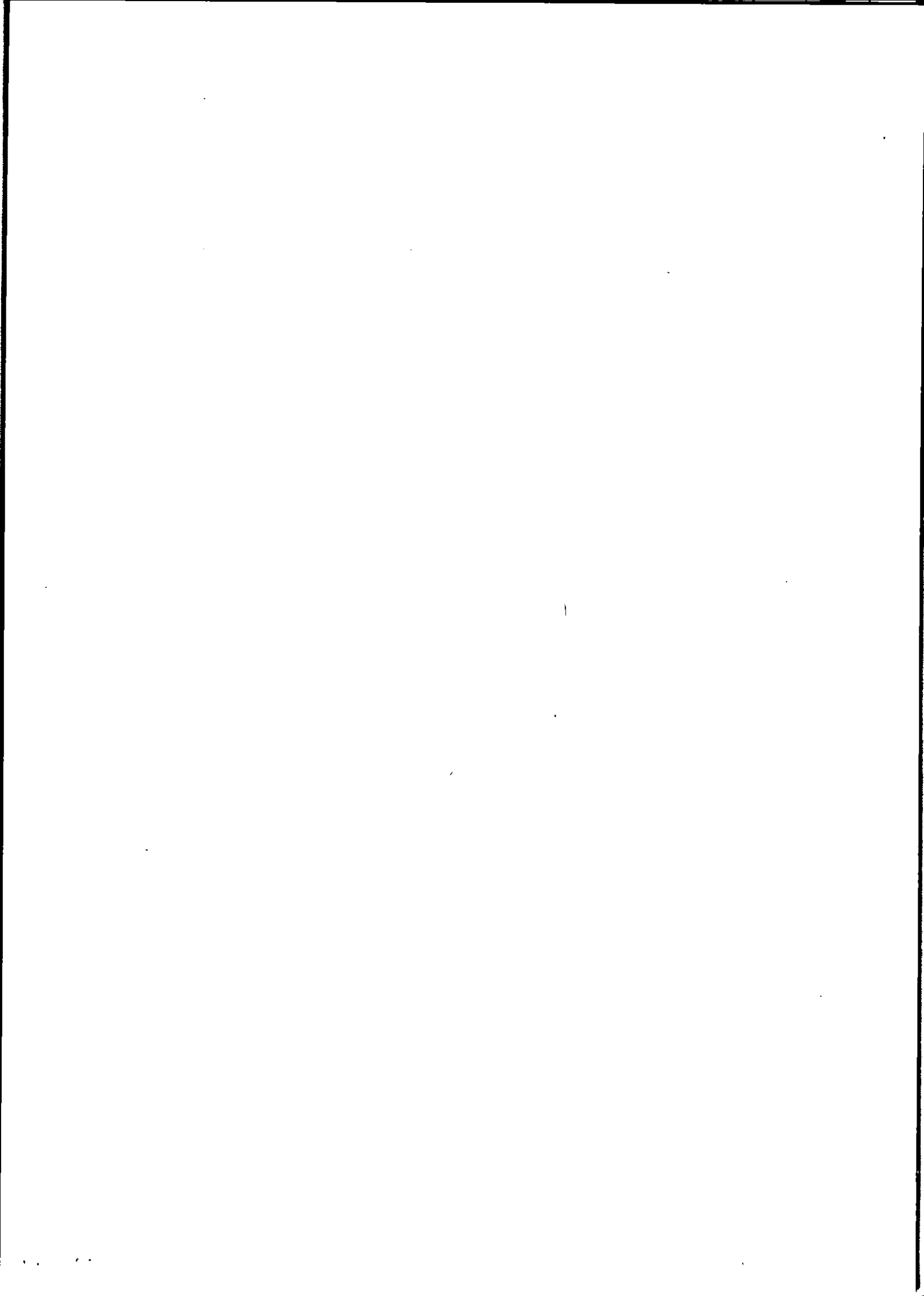
[13] The Minister, acting in terms of the powers conferred upon him by the said legislation, proceeded to publish **Legal Notice No.272/2021**. It is provided in this notice that;

“Declaration of Municipality

2.(1) The area defined in the attached schedule is declared Buhleni Municipality.

(2) The Buhleni Municipality shall be under the authority of a Town Council.”

[14] At the hearing of the matter, the Court enquired several times from Applicants’ representative whether the property that is being contested falls outside of the boundaries designated by the Minister in terms of the Legal Notice. The response from counsel was that the property in



question falls within the boundaries of the area designated by the Minister as a town. It is also not alleged by the Applicants in their papers that the property they are contesting falls outside of the boundaries of Buhleni municipality as designated by the Minister. All that the Applicants seek is to interdict the ministry and anyone acting under the directions of the ministry from interfering with the property in question.

[15] It was argued on Applicants' behalf that the application before Court was one for *mandament van spolie*. In the notice of motion the relief sought is primarily for the grant of an interdict. It is in the Founding Affidavit that the Applicants purport to establish a case of spoliation. It is, for instance alleged in paragraph [16] of the Founding Affidavit that;

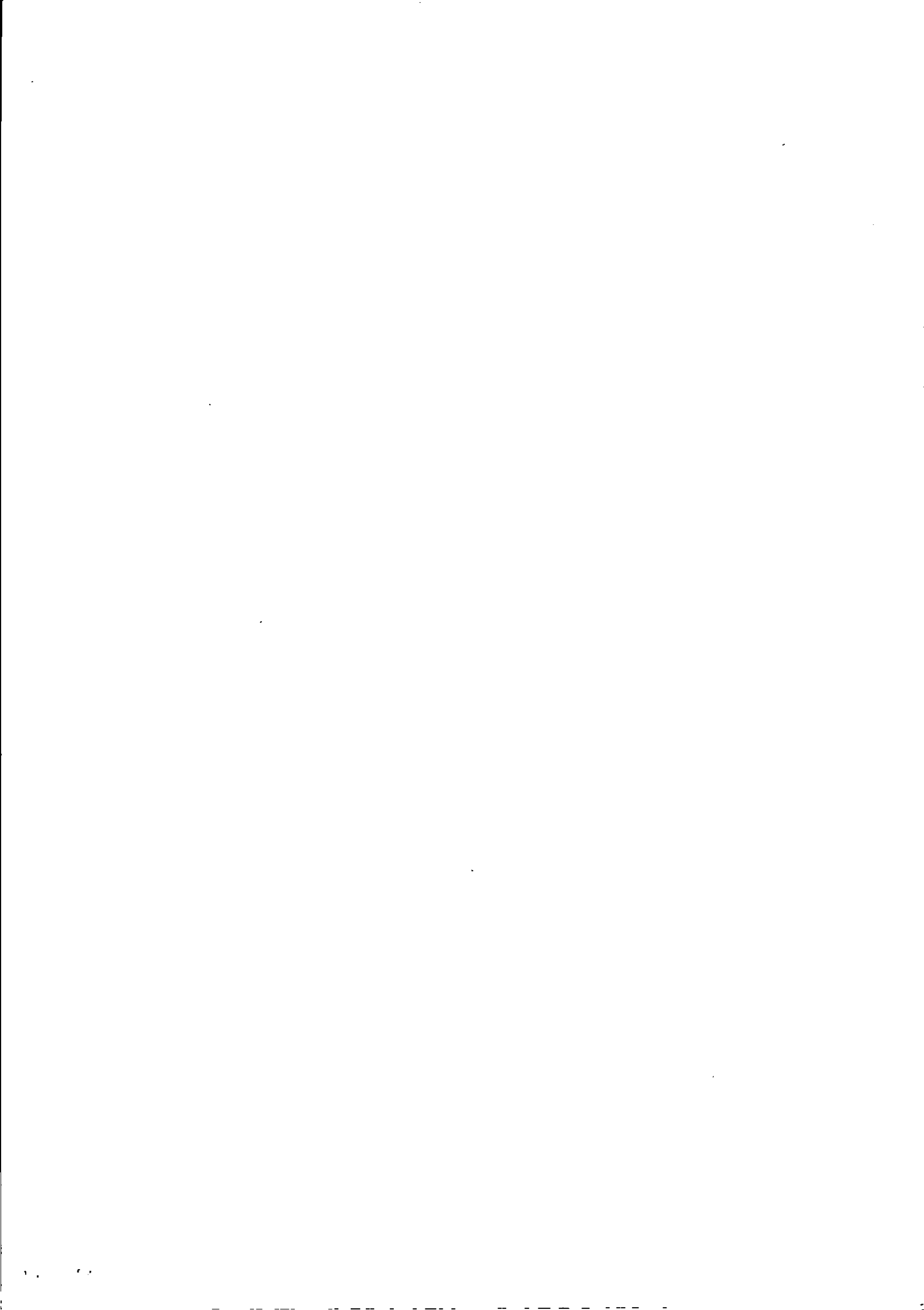
“On or around the 15th of May 2023, 1st Respondent, in the company of the 2nd Respondent, came to the piece of property which is in our possession and removed the fence and started conducting excavation works on the property again.”



[16] The notice of motion which sets out the main relief is not in tandem with the facts alleged in the Founding Affidavit. A party seeking an interdict, whether on an interim or final basis, has to establish a clear right to the relief sought, that is, amongst other requirements. On the other hand, a party alleging a possessory right by means of spoliation is only required to prove 'peaceful and undisturbed possession and that he or she was unlawfully deprived of such possession'. It is thus important that litigants approaching the Court for the relief of *mandament van spolie* must exercise skill and caution in the way that they craft the relief they seek. In this case for example, the relief that should have been sought by Applicants (by way of example) is that;

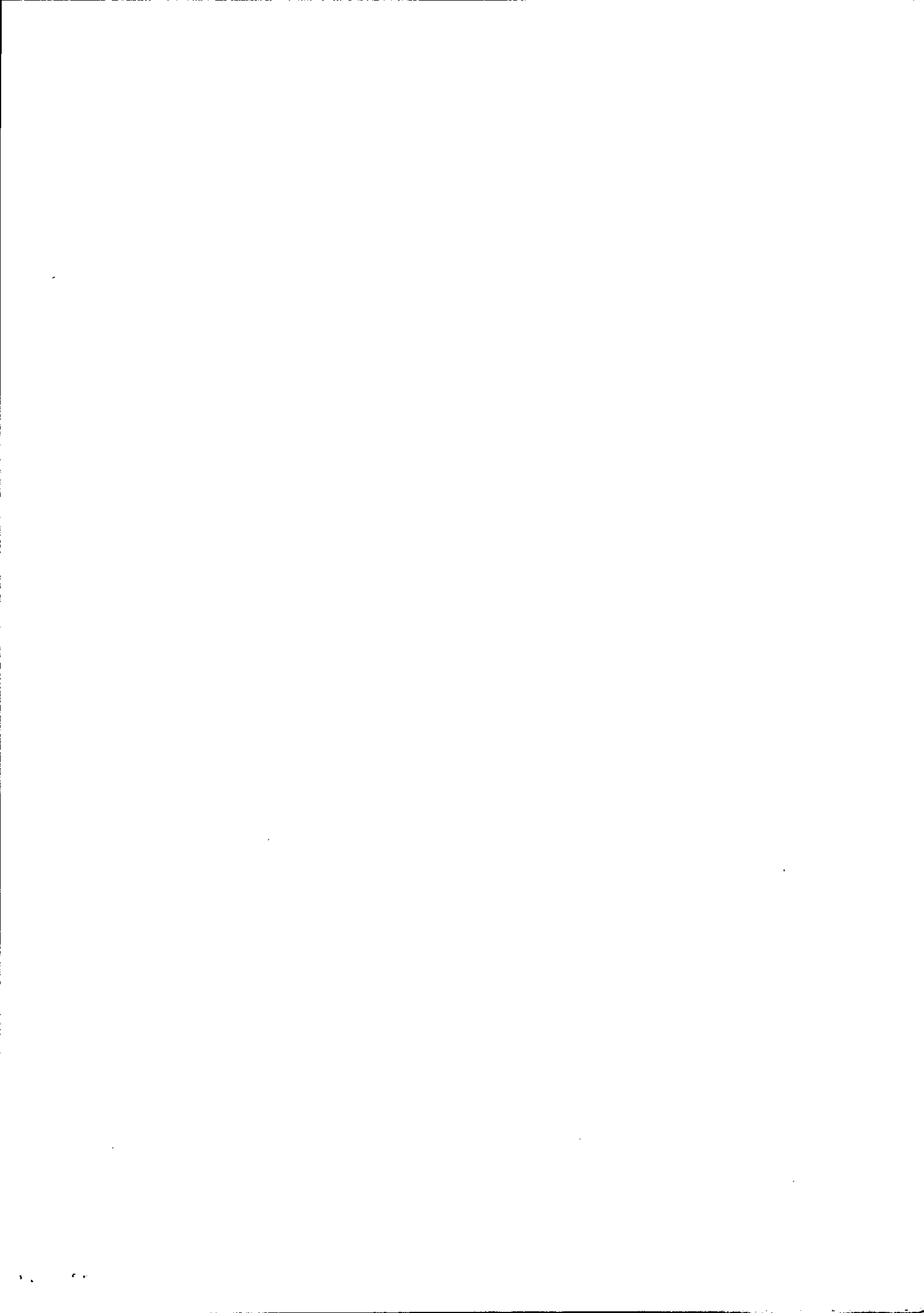
- (a) **An order be and is hereby issued declaring Applicants to be in lawful and undisturbed possession of the property, to wit, a piece of land situate on Eswatini Nation Land at Buhleni area (full description of the location).**

- (b) **That the excavation works or interference currently taking place on the said piece of land by 2nd and 3rd Respondents' be and is hereby declared to be wrongful and unlawful.**



[17] The example given herein above can of course be improved depending on a selection of words by the drafter involved in the matter. What has to be avoided at all costs is the appearance or indication that the order sought is one for a final interdict. As matters stand, the Applicants are required to prove a case for the granting of a final interdict. This is because at the end of the day, it is the ultimate order granted by a Court that determines the true nature of the application before Court. If for example, the Court were to grant a final interdict in the present application, that would mean the Applicants were able to prove all the requirements for the granting of such relief. However that cannot be the case in this matter because the Applicants have not addressed even a single requirement for the granting of such relief, but instead pleaded a case of spoliation in their Founding Affidavit.

[18] If the Court were to give Applicants the benefit of the doubt and treat their application as one for spoliation; would they succeed on the facts of the matter? In **Khumalo v Khumalo and Another [2000] SZHC 99 (29 December 2000)**, the High Court examined in detail the requirements for the grant of a spoliation order. His Lordship,



Masuku J, was required to determine whether an order of ejectment issued by the Swaziland National Council Standing Committee (S.N.C.S.C), in the context of spoliation proceedings on Eswatini Nation Land, was lawful. The Court stated as follows;

“[2] The purpose of the *mandament* is “to restore unlawfully deprived possession *ante omnia* to the possessor, in order to prevent people from taking the law into their own hands.” *Kleyn and Borraine, “Silberberg and Schoeman’s Law of Property”, 3rd Edition, Butterworths, Pretoria, 1992 at page 130. In order to succeed in obtaining relief under these proceedings, the Applicant must prove-*

(a) That he was in possession of the thing, and

(b) That he was illicitly ousted (despoiled) from such possession.”

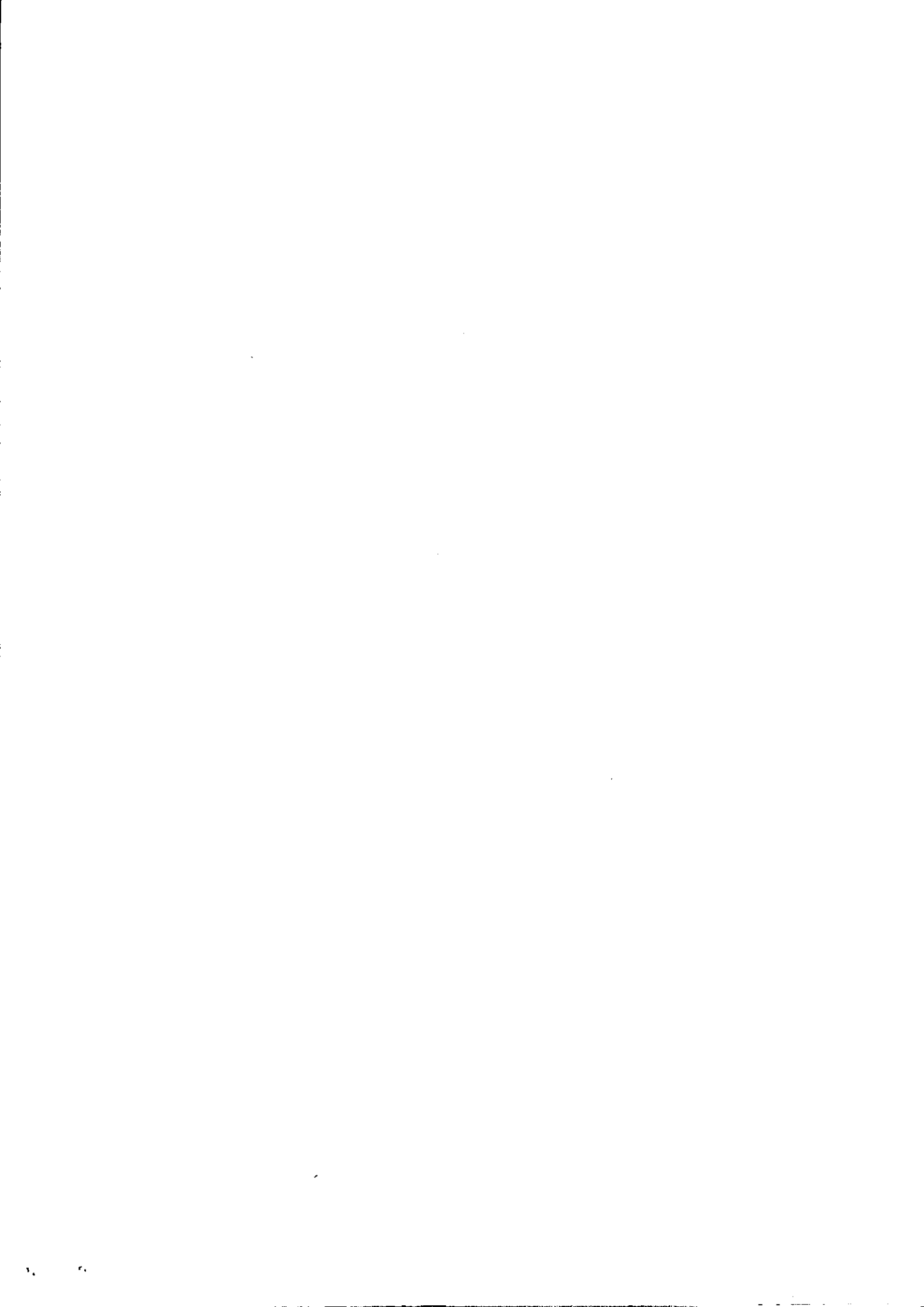
[19] The Court in dealing with the second peremptory requirement of *mandament van spolie* ruled that the order of ejectment issued by the S.N.C.S.C, ejecting the Applicant from his premises, was unlawful as



this body had no authority to issue such orders. Accordingly, on the facts of the present matter, even assuming (bearing in mind that Applicants allege that the land in question was allocated to their deceased father), are in peaceful and undisturbed possession of the piece of land in question, they still needed to prove how or in what manner it can be said that they were illicitly or unlawfully despoiled of their property.

[20] The argument by Applicants to the effect that the High Court previously issued an order or orders restoring the property to them does not aid Applicants in any way because the facts then may have favoured the granting of those orders. It was in 2015 when the High Court issued those orders. The Applicants' father may have been still alive, but even if he was not, there was no declaration then, for the area to be converted to a municipality.

[21] The Applicants have not challenged the Minister's exercise of powers in terms of Section 4 of the Urban Government Act, 1969. In the absence of a challenge to the Minister's declaration and the setting aside of the conversion of the area from individual ownership or



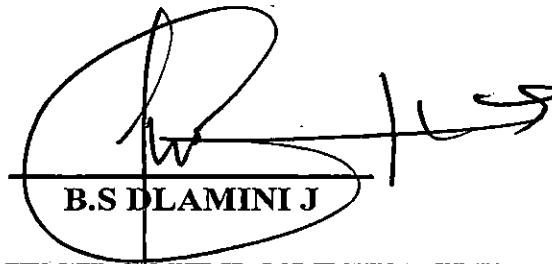
possession to a municipality, it cannot be said that the second requirement of the *mandament*, namely unlawful deprivation, has been established by Applicants. The peaceful possession which Applicants allege they enjoyed, ceased to exist in the year 2021 when the Minister published the Gazette and when the process of turning the area into a municipality was implemented.

[22] It is the Court's final determination that Applicants' application cannot succeed in the circumstances. The Court has deemed it unnecessary to determine the other legal issues arising in the matter. The Court accordingly issues the following orders;

(a) The *rule nisi* granted in the matter is hereby discharged and the application dated 23rd May 2023 is dismissed.

(b) Costs at the ordinary scale to follow suit.





B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicants

Attorney Ms. L.R Simelane

(Khumalo Ngcamphalala Attorneys)

For Respondents:

Attorney Mr. M. Simelane

(Attorney General's Chambers)

