

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 395/22

In the matter between:-

**ESWATINI ASSOCIATION OF INDIGENOUS
CONSTRUCTION**

Applicant

And

THEMBUMENZI DUBE

1st Respondent

THE PRINCIPAL SECRETARY OF THE

2nd Respondent

MINISTRY OF WORKS AND TRANSPORT

THE ATTORNEY GENERAL

3rd Respondent

THE CONSTRUCTION INDUSTRY COUNCIL

4th Respondent

Neutral citation: Eswatini Association of Indigenous Construction v Thembumenzi Dube and 3 Others (395/22) [2022] SZIC 03 (16 February, 2023)

Coram:

DLAMINI NG'ANDU - JUDGE

*(Sitting with Ms.P.P. Dlamini and Mr.N.M.V Gumbi
Nominated Members of the Court)*

HEARD: 15 December 2023

DELIVERED: 16 February 2023

RULING ON THE POINT IN LIMINE

[1] Presented before this Court is an application that came as way of urgency brought by the Applicant seeking the setting aside of the appointment of the (1st) First Respondent by the Principal Secretary of the Ministry of Works and Transport(2rd Respondent) to the position of Chief Executive Officer(CEO) of the Construction Industry Council (CIC).

[2] The order sought was in the following terms:

1. **Dispensing with the rules of the Court relating to the limits manner of service as that the matter be enrolled as argue of urgency.**
2. **Declaring the appointment of the first Respondent by the 2nd Respondent unlawful; as not consistent with the Construction Industry Council Act, 2014 in terms of 518.**
3. **Interdicting and restricting the 1st Respondent from carrying out any duties and function as acting Chief Executive Officer within the 4th Respondent pending finalization of the application.**
 - 3.1 **That prayer 3 above operate with interim as immediate effect.**
4. **That a *rule nisi* do hereby issue calling upon the 1st,2nd, and 4th Respondents to show course why the prayers they want should not be made final.**
5. **Cost of suite.**

[3] Mr Mdladla represent the Applicant whilst Mr Mashinini represent the 2nd and 3rd Respondent and Mr Simelane represent the 4th Respondent.

[4] 2nd and 3rd Respondent filed points in *limine* and so did 4th Respondent. Counsel for the 4th Respondent however subsequently abandoned their points and indicated that they will abide by order made by the Court as there was no specific remedy sought against the 4th Respondent (Attorney General).

[5] It must be noted that an application to join Mr Mnisi as the 5th Respondent was accordingly granted with no objection on the part of the other Respondents. Mr Mnisi is the current Acting Chief Executive Officer. Subsequent to Mr Machawe Mnisi being joined as the 5th Respondent he filed his affidavit.

[6] The following points *in limine* were raised:

1. *Locus standi*; that the Applicant has no *locus standi* to institute and prosecute the present application, and lacked direct and substantial interest in the subject matter before Court.
2. Incompetent relief sought, that the Applicant was seeking a declaratory order against Respondent whereas an executive decision can only be challenged by means of reviews pleading and not declaratory relief.

[7] It would appear the Respondent abandoned the rest of the points *in limine* during their argument as they never pursued their argument further on them so the Court herein will therefore concern itself with the argued points and conclude as the rest were abandoned and there was no argument on them.

[8] As indicated by this Court to the parties points *in limine* or points of law sought to be argued first before going to the main application for the simple reason that the

decision on them may or may not put an end to the main application before it even commences, that is if the party raising the said point succeeds.

Locus standi:

- [9] It is common cause that the Applicant is part and parcel of the council that is to say the Construction Industry Council which is established under **Section 3** of “ **The Construction Industry Council Act no 14 of 2013**”. Further **Section 6 (1)** of the same Act above makes the Applicant an affiliate of the council which states the composition of the council.
- [10] Over and above the Applicant being an affiliate body of the council, Applicant is also a body corporate of Construction Consultants, it is therefore a legal entity that can sue and be sued in its own right. It being a legal entity it therefore speaks through its authorized individual such as the Chairperson or the Chief Executive Officer if any. In the event the Applicant has to act in a matter before the Court that calls for the authorized personnel to hold a meeting where upon those specific authorized personnel would take a resolution on whether or not to take the matter to Court and who on behalf of the body corporate would represent it that includes the individual to swear to the affidavit on its behalf and on the issue of legal representation.
- [11] I fully align myself with the decision held in the case of **Light for the Nations Church (Pty) Ltd vs Themba Hlophe case number 397/18 per Hlophe J** where it said:

“It is not in dispute that a company speaks through its directors and even then by means of a resolution taken by them. Referring to

resolution in the sense, the Black Law Dictionary, 10th Edition, defines a resolution in the following words:-

“Resolution refers to a formal action by a corporate Board of Directors or other corporate body authorizing a particular act, transaction or appointment also termed corporate resolution.”

*It is a long settled position of our law that a company or corporate body requires a resolution authorizing proceedings in Court for such proceedings to be viewed as those of a company or as legitimate. Even then, I have no doubt the directors who take such resolution **should be those that legally qualify to do so** [Emphasis is mine]. In other words, a non-director, or one whose term has expired or improperly appointed may not qualify to take such a resolution”.*

[12] The lack of a resolution on the part of the application herein was brought to their attention when they first appeared in Court on the 09th December 2022. Even on the 12 of December 2022 when the order for the joiner of Mr Mnisi was made for him to be the 5th Respondent they were aware of his position to which on the 15th of December the Applicant through their attorney file in Court what I would refer to as a **“letter of authority/ power of attorney”** addressed to *whom it may concern* dated 2nd December 2022. This letter suggest that it was authored by one Mcebo Maziya who is alleged to be the Secretary General.

[13] Looking at the above document I would not call it a resolution for the following reasons:

- Firstly, just on the face of it, it is a letter addressed “*to whom it may concern*” written by the Secretary General.
- In its content, this letter suggests that a meeting was held, it does not state when the meeting was held and even who was present at the said meeting and not to mention whether or not those unknown individuals (as they are not mentioned) were legally qualified to take such decision for and on behalf of the Association.

[14] Even if one was to try and look at this “letter” as a resolution, still it would not save the day for the Applicant as it is impossible to tell who actually took the decision to bring this matter before the Court in the Applicant Association. I cannot therefore arrive at the conclusion that even before one can proceed with the merits, these proceedings were properly authorized to be before this Court. It therefore follows that this point on *locus standi* succeed and the application stands to be dismissed.

[15] I must mention that the point on *locus standi* is not just a mere technically but rather the key that has the ability to either open or shut the door in Court for the Applicant. It is therefore irrelevant whether or not the Court agrees with the Applicant on the merits as the merits of this case have not been decided.

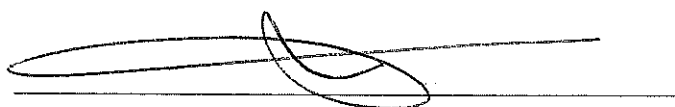
Incompetent Relief:

[16] I must point out that with the point of *locus standi* having succeeded, it no longer makes much of a difference whether the relief sought was competent or incompetent

other than to state that Applicant is part of the Council established by the Act, in **Section 18** and they know what ought to happen in the appointment of the Chief Executive Officer which I believe both Applicants and all Respondents herein, are fully aware of considering that the council is a creature of statute, that is to say the construction **Industry Council Act number 14 of 2013**. I would therefore urge the parties to reconsider that aspect, closely and Act accordingly in terms of the Law that governs them, the Act that is.

[17] In conclusion the point *in limine* succeed as I could not come to the conclusion that these proceedings are properly authorized through a resolution taken at a meeting by legitimate authorized personnel. It therefore follows that this application is dismissed and each party is to bear their own costs.

The Members Agree.



D. F. DLAMINI-NGA'NDU

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : MH Mdladla
FOR RESPONDENTS : Attorney General (1st, 2nd and 3rd Respondent)
SM Simelane (4th Respondent)