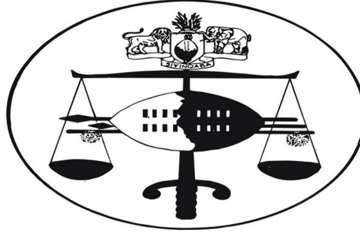

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 19/2012

In the matter between

SITEKI TOWN COUNCIL **Appellant**

and

SWAZILAND COMMERCIAL AMADODA ROAD TRANSPORTATION COUNCIL AND 81 OTHERS **Respondents**

Neutral citation: *Siteki Town Council v Swaziland Commercial Amadoda Road Transportation Council and 81 Others* (19/2012) [2012] SZSC 62 (30 November 2012)

Coram: RAMODIBEDI CJ, DR. TWUM JA and OTA JA

Heard: **13 November 2012**

Delivered: **30 November 2012**

Summary: Civil Appeal against order for a Mandament Van Spolie issued against appellant; conditions for issue of such order; respondents not in possession of bus rank, subject matter of dispute; appellant statutory body with responsibility under section 55(1) (d) of Urban Government Act, 1969, to set up and, manage bus ranks in the Council area; respondents used bus rank on payment of permit fee; order of Mandament Van Spolie inappropriate, set aside. Appeal allowed with costs.

DR TWUM J.A.

[1] On or about 10th February, 2012, the applicants in the court a quo, (hereinafter "the respondents") moved an application before the High Court, on a Certificate of Urgency for an order directing the respondent (hereafter "the appellant") forthwith to restore possession to the respondents of the Siteki Bus Rank.

[2] The first respondent's case in support of the application was that it was a voluntary association established in terms of a constitution which vested it with power to sue and be sued in its own name. It said its principal place of business was at Madoda Township in the District of Manzini. It further claimed to be the supreme transport body and the sole representative of the transport industry in the Kingdom of Swaziland.

[3] The second respondent, Thokozile Masango claimed she had the authority of 80 other vendors who conducted their business at the said bus rank to litigate on behalf of herself and also on behalf of the 80 others.

[4] The respondents claimed to have conducted their respective businesses at the rank since 1980, peacefully. They also alleged that they had had undisturbed possession of the bus rank since then until 6th February 2012

when the appellant ejected them and denied them access to the bus rank by digging trenches at the entrance and exit points of the bus rank.

[5] The first respondent further deposed in the Founding Affidavit that the appellant did not have any court order; neither did it have their consent to evict them. It therefore alleged that the appellant had taken the law into its own hands.

[6] At this stage, it is worth pointing out that even though the 2nd respondent claimed to have had authority to litigate on behalf of 80 vendors carrying on their businesses at the bus rank, none of the 80 vendors swore to any confirmatory affidavit in proof of the 2nd respondent's alleged authorization.

[7] The application was opposed by the appellant whose Acting Town Clerk, Mhlonipheni Magongo, swore to the appellant's Answering Affidavit, saying that it had its authority to represent it in the application.

[8] In its opening salvo, the appellant denied that the first respondent had any locus standi to sue for mandamen van spolie because at no time had it ever been in possession, legal or otherwise, of the bus rank. Further, the appellant argued that the first respondent had failed to demonstrate its legal interest in the management of the National Road Transportation operations.

It said, rather, there was a legal entity for that purpose established under the Road Transportation Act, 2007. The appellant continued by saying the first respondent was not a member of the statutory Road Transportation Council set up to manage road transportation operations in the country.

For emphasis, the appellant annexed to its Answering Affidavit, a list of users of the old site who had declined to align themselves with the respondents.

[9] The appellant said by virtue of its statutory powers under section 55 (1) (d) of the Urban Government Act, 1969, it initiated a programme to improve the facilities at the old bus rank by building a new one on Plot 995 with improved health facilities, a new market and better arrangements at the new bus rank. It said the first respondent was without just cause kicking against the relocation to the new site. It gave comprehensive details of consultations it had had with users of the old site as well as other stakeholders. In particular, it said on account of the fact that the Health Authorities had condemned the sanitation in the old site, it had a public duty to take all necessary steps to abate the insanitary public health hazard which was menacing the old site before it developed into an epidemic.

Appeal to this Court

[10] On 28th March 2012 the High Court gave judgment for the respondents and made a spoliation order in their favour.

[11] The appellant was dissatisfied with and aggrieved by the order of spoliation and appealed to this court.

[12] The following grounds of appeal were set out in the Notice of Appeal filed on 29th March 2012:-

1. The Court a quo erred in fact and in law in finding that the Bus Rank as a public facility is capable of individual possession.
2. The Court a quo misdirected itself in fact and in law in finding that the Respondent a quo acted contemptuously and effected demolitions when the Applicants a quo were already in possession of an interim order.
3. The Court a quo erred in law and in fact in not holding that the application was fatally defective by reason of the non-joinder of the Road Transportation Council.
4. The Court a quo erred in law and in fact in holding that the doctrine of estoppel was applicable to the facts of this particular case.

5. The Court a quo erred in law and in fact in not holding that the Respondents had failed to establish that they were ever in possession of the site in question.

[13] It is on record that on 10th February 2012, a consent order was made removing the matter from the roll, whereupon the court directed that the status quo should be maintained, pending the finalization of the application in the court a quo.

[14] It is also on record that on 18th April 2012, ie, before the appeal was heard, Q.M. Mabuza, J issued an order by consent of the appellant and the respondents interdicting and restraining the first, second, third and fourth respondents from entering and/or resuming their operations at Plot No 48 – Siketi (Old Bus Rank) pending finalization of the appeal which was pending in this Court, under Supreme Court Civil Appeal No 19/12.

[15] In its judgment, the court a quo noted that the appellant acted contemptuously and defied the court by failing to maintain the status quo. That may be so, but I am persuaded that the court a quo seemed to have approached its judgment in a spirit of anger after making that observation but in a civil action, the court is expected to decide the matter on a balance of the probabilities. The appellant may have done some more pulling down

of structures at Plot 48. The undeniable fact was that the new bus rank at Plot 995 had been ready for use before the 12th of February when the respondents filed their application for the order of spoliation.

[16] After a very careful consideration of all the matters raised by the parties I am persuaded that the balance of convenience favoured the appellants and that the judgment of the court a quo should be set aside.

[17] It was not denied by the respondents that the land on which the bus rank at the old site was erected was government land. The judgment gave little or no attention to the fact that it was the appellant, a statutory body, which had overall responsibility to manage and control social amenities such as bus ranks in the Council area. Under the schedule made pursuant section 56 of the Urban Government Act, 1969 the appellant is empowered under Regulation 2 to establish, acquire, erect, maintain promote, assist and control –

(a) Omnibus stations and related office accommodation, cafes, restaurants, refreshment rooms and other buildings

(f) markets

(k) public lavatories and urinals

Under section 55 (1) (d), the Council has a duty to safeguard public health, etc., and under section 57(1) the Council may charge fees for any service or facility provided by it or for any licence or permit issued by it.

It is quite clear that the appellant had authority to relocate markets or the bus terminal from Plot No. 48 to Plot 995.

[18] It has been stated earlier that the unhygienic conditions at the market at Plot 48 had been condemned by the Health Authorities. The appellant conducted extensive negotiations among the market users as well as rate payers. The appellant further pointed out that for a number of years it had through a permit system, allowed public transport operators and vegetable vendors to access its Bus Terminal and the Market.

[19] In view of these matters, the appellant erected a new bus terminal at Plot 995. Rate payers, in particular, were justified in complaining that the new site was rapidly becoming a white elephant as it was allowed to lie fallow as a result of opposition from the first respondent.

[20] In my view, the court a quo grievously erred when it held at paragraph 10 of the judgment that the "issue for determination by this court is whether or not the respondent resorted to self-help and dispossed the applicants

without a court order or without their consent." Surely, that was a matter which was merely ancillary to the quintessential issue. That was, which body had authority to manage and control the bus rank. To put in the context of the respondents' application, which body had possession and control of the bus rank – bearing in mind that the respondents sought an order "directing the [appellant] to forthwith restore possession of the Siteki Bus Rank to the applicants." Obviously, if before 6th February 2012 they did not have possession an order that possession should be restored to them forthwith was simply a non-sequitur. The respondents never claimed in these proceedings that they ever had possession of the bus rank. At most, members of the first respondent who had buses were given access on payment of the permit fee. Market owners paid for their permits to do business at the bus rank. The appellant even controlled access to the bus rank by the system of permits and payment for those permits. The first respondent may have had control of members of their voluntary association, but that gives it no authority over siting of bus ranks or even access thereto.

[21] In my opinion there was no basis for the order by the court a quo; seing that that order depends on a claimant establishing on the balance of the probabilities that it had possession of the facility. The appellants were entitled to decommission the bus rank at Plot 48. They have established a new one at Plot 995. Plot 48 does not belong to the respondents, with or

without a bus rank. Of course, this is a free country and inhabitants need not use facilities provided by Urban Councils for the proper management of their areas, provided in the process, their activities do not fall foul of the law.

In the result I set aside the order of the court a quo granting the respondent the order of spoliation. The old bus rank at Plot 48 has been validly decommissioned and the appellant are entitled to manage the new bus rank at Plot 995 as they are mandated to do under the Urban Government Act 1969. There will be costs to the appellants on the usual scale.

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DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

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M.M. RAMODIBEDI
CHIEF JUSTICE

I also agree.

____
E.A. OTA
JUSTICE OF APPEAL

COUNSEL:

For Appellant:	**Adv. M.L.M. Maziya**
For Respondents:	**Ms. N. Ndlangamandla**