IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1455/13

In the matter between

SWAZILAND NATIONAL SPORTS COUNCIL	**APPLICANT**
And	
MINISTER OF SPORTS, CULTURE AND YOUTH AFFAIRS	**1ST RESPONDENT**
PRINCIPAL SECRETARY OF MINISTRY OF SPORTS, CULTURE AND YOUTH AFFAIRS	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**
MENZI DLAMINI	**4TH RESPONDENT**
SWAZILAND NATIONAL SPORTS AND RECREATION COUNCIL	**5TH RESPONDENT**
SWAZILAND SAVINGS AND DEVELOPMENT BANK	**6TH RESPONDNET**

Neutral citation: *Swaziland National Sports Council v Minister of Sports, Culture and Youth Affairs & 5 Others (1455/13*) 2013 [SZHC] 214 (27 September 2013)

Coram: **OTA J**

Heard: **24 September 2013**

Delivered: **27 September 2013**

Summary: **Civil procedure points in limine on lack of locus standi, urgency and non-joinder. Applicant's pleading discloses a cause of action and the constituent ingredients of an enforceable right. Applicant thus has locus standi to institute proceedings. The application being a spoliation proceedings is by its very nature urgent. Points in limine dismissed. Requirements for an interim interdict met; interim interdict granted.**

JUDGMENT

OTA J

[1] The Applicant commenced this application under a certificate of urgency contending for the following reliefs:-

> **"1. That the Rules of the above Honourable (sic) relating to usual forms, service and time limits be dispensed with and that this matter be heard as one of urgency in terms of Rule 6(25) of the Rules of the above Honourable Court.**

2. **That 4th and 5th Respondents, their employees, workmen and other persons claiming the right of possession of the offices situate at E2 Printpak Square, Sheffield Road, Industrial Sites, Mbabane, be directed and ordered to immediately restore the undisturbed possession and control of the premises to the Applicant with immediate effect.**

3. **That the Sheriff or his deputy be authorized to eject the 5th Respondent, its employees and other persons claiming the right of possession of the premises through the 5th Respondent in the event of possession and control of the premises not having been restored to Applicant within twenty four (24) hours from the date of service upon the Respondents and/or all other persons who may be found to be in possession or control of the premises (other than the applicants representatives) of this order by the Sheriff or his Deputy.**

4. **That the 1st, 2nd, 3rd, 4th and 5th Respondents be interdicted and restrained from interfering in whatever manner with the Applicant's responsibilities as outlined in the Memorandum of Understanding signed by the Applicant and the Swaziland Government dated the 8th July 2010.**

5. **That the 4th and 5th Respondents be interdicted from conducting the Applicant's bank account No. 77017919410 held with the 6th Respondent.**

6. That the establishment of the 5th Respondent and it's board of directors as published in Legal Notice No. 112/2013 be declared unlawful and of no legal force and effect.

7. That all the Respondents be ordered to pay the costs of this application jointly and severally at an attorney and client scale the one paying the other to be absolved.

8. That pending finality hereof, prayers 1, 2, 3, 4, 5, 6 and 7 be with immediate and interim relief.

9. Further and alternative relief."

[2] It is pertinent for me at this nascent stage to describe the parties herein as they appear in the Applicant's founding affidavit:-

"**3. The Applicant is Swaziland National Sports Council, a non-profit making organization, capable of suing and being sued in its own name, established by the provisions of its own constitution, capable of performing all acts that bodies corporate may by law perform, carrying on its duties at office no E2 Printpak building, Sheffield Road Mbabane in the Hhohho District Swaziland.**

4. The 1st Respondent is the Minister of Sports, Culture and Youth Affairs cited herein in her official capacity, of Swazi Bank Building, Gwamile Street, Mbabane, Hhohho District.

5. The 2nd Respondent is the Principal Secretary of Ministry of Sports, Culture and Youth Affairs, cited herein in his official capacity as the officer with overall responsibility of the Ministry of Sports, Culture and Youth Affairs, of Swazi Bank Building, Gwamile Street, Mbabane, Hhohho District.

6. The 3rd Respondent is The Attorney General, cited herein in his official capacity as the legal representative of the Government of Swaziland, 4th Floor Ministry of Justice building, Usuthu Link road Mbabane, Hhohho District

7. The 4th Respondent is Menzi Dlamini, a Swazi adult male chairman of the Applicant, who is also the Chairman of the 5th Respondent.

8. The 5th Respondent is the Swaziland National Sports and Recreation Council, a group of individuals appointed by the 1st Respondent through a publication in a gazette dated, which has spoliated the applicant of it's offices at Printpak Building, Sheffield road, Mbabane, District of Hhohho

9. The 6th Respondent is Swaziland Savings and Development Bank, a financial institution established by its own statute, with powers to sue and be sued in its own name, having its principal place of business at Swazi Bank Building, Gwamile street Mbabane, District of Hhohho."

[3] When this matter served before me on the 24th of September 2013, Counsel for the Applicant Mr B Magagula, sought an interim order in terms of prayer 5 of the notice of application learned Counsel for 1st, 2nd and 3rd Respondents

Mr V. Kunene, as well as learned Counsel for the 4th and 5th Respondents Mr L.R. Mamba, opposed the application by raising points of law on *locus standi*, urgency and non-joinder, seeking to defeat the entire suit *in limine.*

[4] Mr Kunene on the issue of urgency argued, that the urgency advanced by the Applicant is clearly self created. That by Applicant's own showing the 5th Respondent came into being on 10th July 2013, thereafter, if the Applicant had any grouse with the appointment of the 5th Respondent, it ought to have approached the Court earlier. Applicant failed to do so only approaching the Court on the 23rd of September, thus giving the Respondents less than 24 hours to respond to the application. Counsel urged the case of **Henwood Humphrey v Maloma Colliery Ltd and Another 1987-1995 SLR vol 4 page 48,** as authority for this proposition.

[5] Mr Kunene further argued, that Applicant's contention may be that since it is a spoliation proceedings, it is one fit for enrollment on the premises of urgency, however, the Respondents are challenging the issue of spoliation. This, Mr Kunene says is because, the question of the Applicant being in continuous and undisturbed possession was defeated upon the appointment of the 5th Respondent, which appointment extinguished the existence of the Applicant, which meant that the Applicant was no longer in undisturbed possession.

[6] Addressing the issue of *locus standi* Mr Kunene contended, that the Applicant lacks the requisite standing to launch these proceedings. He submitted that being a body of more that 30 sports Associations, the Applicant cannot come to Court without the authority of the different sports

Associations it represents. Therefore, the absence of an averment in the founding affidavit that the different sports Associations resolved that the Applicant should bring this suit, defeats the standing. Counsel contended, that the allegation by Applicant that its members were locked out of its premises, therefore, it could not retrieve the minutes of the resolution empowering it to commence these proceeding, cannot avail the Applicant. He contended that the fact that Applicant was allegedly locked out of its premises as far back as the 10th of July 2013, also defeats the urgency in the application commenced on the 23rd of September 2013. It is also Mr Kunene's position, that the Applicant falls under category A of the Public Enterprises (Control and Monitoring) Act, by reason of the fact that it is fully funded by Government and is thus a Government parastatal.

[7] Mr Kunene posited that the effect of Legal Notice No. 119/2012 which designated the Applicant as a Public Enterprise is that the Applicant and the Memorandum of Understanding with the Government (MOU), seized to operate in terms of article 17 of the MOU.

[8] It was further Mr Kunene's stanze, that the effect of Section 2 of Legal Notice No. 124/13, is that the Applicant seized to operate in terms of the Legal Notice. That when Legal Notice 119/2012 came into being, what should have happened is that the Minister could appoint a new board but because the term of office of the Applicant was to terminate at the end of March 2010 i.e its 4 year period, the Applicant continued to be in office until 31st March 2013.

[9] For his part Mr Mamba fully associated himself with the posture of Mr Kunene, and went on to contend, that the urgency raised by the Applicant is not only self created but is also strategic. This, he say is because there is no explanation why the proceedings could not be launched between the 10th of July and now, and the affidavit which on the papers was filed on the 19th of September 2013, could not be served between the 19th and the 23rd. Counsel contended further that the Applicant basically brought the application to obtain an interim order in aid of its financial interest in the matter. This, so goes the argument, is called snipping. Counsel cited the case of **Makhowe Investment (Pty) Ltd v Usuthu Pulp Co. Ltd (1987-1995) SLR Vol 4 page 85,** in support of this posture. Mr Mamba called for a dismissal of the entire suit on this ground alone.

[10] On the question of *locus standi*, Mr Mamba contended that this is tied up with the issue of non-joinder of two sets of parties, namely, the individuals whom the Applicant alleges in its papers make up the 5th Respondent, as well as the Minister of Finance who gazetted the 5th Respondent as a Public Enterprise.

[11] Mr Mamba contended, that the whole application is hinged on this act of the Minister which defeated the MOU between the Applicant and Government. That upon issuance of the gazette the Minister was entitled to appoint a new board in conjunction with the 5th Respondent. Therefore, the Applicant cannot set aside the consequences of the act without challenging the act. Therefore, the Minister must be joined because the granting of the orders sought will undermine his office, so Mr Mamba argued.

[12] Counsel further posited that all the Minister did by Legal Notice No. 124/2013 was to put in a new name. He did not form a new organization contrary to Applicant's contention. He referred to legal Notice No. 66 of 1998 as authority for this proposition. Counsel contended, that Applicant's name was changed to the 5th Respondent and a new board appointed. Applicant and 5th Respondent are one and the same person. This means that the proceedings is unauthorized.

[13] It was further Counsel's contention that paragraph 1 of the founding affidavit where the deponent of the founding affidavit states that there was a resolution that entitled him to bring this application, is at variance with paragraph 19 which does not make any mention of a resolution that was passed and worse still, such resolution is not annexed to the papers filed of record.

[14] In response, learned Counsel for the Applicant Mr B Magagula contended, that the Applicant is a legal personality with the capacity to sue or be sued in its own name, which fact is recognized in the MOU with the Government.

[15] He contended that the MOU with the Government, the latest of which was signed by 1st Respondent on behalf of Government, on 8th July 2010, has no stipulated duration. Article 17 propounds that the MOU comes to an end on the happening of any of two events:-

(1) The parties consent that the agreement be terminated, which consent the Applicant has not given.
(2) The council ceased to be council and became, a public Enterprise.

[16] However, Applicant has always decried its designation as a public Enterprise without its consent, so posited Mr Magagula.

[17] Counsel contended that since the Applicant is a legal personality, the publication of the gazette cannot have the effect of cancelling its existence. Mr Magagula expressed the view that such a proposition is clearly unconstitutional. This, he says is because a publication in the gazette is not necessarily law, but only operates as notice for Government. It merely notifies the public of the events contained therein, but the legality of those events are not established by the gazette.

[18] Mr Magagula further contended that if Government wished to delegate its responsibility to regulate its sports activities in Swaziland to another entity, then it should have cancelled the MOU with the Applicant.

[19] On the point of urgency Mr Magagula argued, that this is an application for spoliation, wherein the Applicant urges the Court to assist it to recover its properties from Government. He contended that the delay in bringing the matter to Court will not deprive the right to sue in these circumstances. He relied on **Gibson Ndlovu v Sibusiso Dlamini Civil Appeal Case No. 30/2011** in his argument (I must say that having carefully perused this authority it has no bearing on the issue of urgency at hand. It dealt clearly with spoliation and dispute of facts).

[20] Be that as it may, Mr Magagula further urged the provisions of Section 19 of the Constitution Act 2005, in contending that the Applicant has a right to its property and cannot be unlawfully deprived of same. He contended that

Government proceeded against the tenets of the Constitution on the mere strength of the gazettes.

[21] Counsel drew the Court's attention to the fact that a lot of other activities justifying the application on the premises of urgency occurred between the 10th of July 2013 and 23rd of September 2013 when the application was launched. These, submitted Mr Magagula, are that the 5th Respondent is now in the process of interfering with Applicant's account; incapacity of the Applicant to exercise its functions as demonstrated in the confirmatory affidavit of Kate Reily; the 5th Respondent is now portraying itself as the entity responsible for sports activities in Swaziland as shown by its communication to Applicant's members as evidenced by annexure SNSC7, as well as the newspaper publication showing the 5th Respondent engaged in activities which are the exclusive preserve of the Applicant.

[22] Both Mr Kunene and Mr Mamba replied on points of law, which I will make references to if the need arises in this decision.

[23] Now, let me from the outset disabuse the notion cast by Messrs Kunene and Mamba, that the natural consequence of the lack of *locus standi in judicio* of an Applicant is dismissal of the suit. It is on the basis of this misapprehension that both Counsel seek a dismissal of this suit on grounds of the alleged lack of *locus standi* by the Applicant.

[24] This proposition is with respect, unsustainable. My view on the matter is that, the issue of *locus standi* is to a great extent linked to the jurisdiction of the Court to adjudicate on the action. The contention that an Applicant lacks

the *locus standi* to institute an action questions the jurisdiction of the Court to entertain and determine the action. It follows therefore that where an Applicant has no *locus standi*, the Court is deprived of the jurisdiction to entertain and determine the action. This informs the trite principle of law that the question of *locus standi* can be raised at any stage of the proceedings or even on appeal, though it is more desirable to raise it at the outset of the proceedings after the Applicant's pleading is filed.

[25] It follows therefore, that where a Court determines that an Applicant has no *locus standi* to institute proceedings, the proper consequential order to be made is striking out of such claim and not a dismissal of same. The rationale is that a dismissal presupposes that the action was properly constituted and the Court has considered the merits of the claim and found it wanting. However, the Court can only look into the merits of a claim if that claim falls within the Court's jurisdiction. Therefore, if the Court is deprived of such jurisdiction by reason of lack of *locus standi*, it cannot properly order a dismissal of the suit.

[26] Commenting on this selfsame question in the case of **Adesokan v Adetunji (1994) 6 SCNJ, (pt I) 123 at 146,** the Supreme Court of Nigeria re-affirmed the principle it enunciated in the case of **Oloride v Oyebi (1984) 5 SC 1**, which is to the effect that:

> **"it is immaterial that pleadings have been completed and full trial conducted. At whatever stage the finding is made that the plaintiff lacks locus standi to maintain the action, the jurisdiction of the Court to entertain the action is affected and the course of action open is to put an end to it by striking it**

out---. If the Court, has no jurisdiction to adjudicate, it cannot dismiss the action"

[27] The foregoing said and done, let us now address the issues raised by first ascertaining what is meant by the term *locus standi* in the context of this case.

[28] *Locus standi* simply put is the right of a party to appear and be heard on the question before any Court or Tribunal. It is the right or competence to institute proceedings in a Court for redress or assertion of a right enforceable at law. It is the legal capacity to institute proceedings in a Court of law and is often used interchangeably with terms like "standing" or "title to sue."

[29] The question of *locus standi* is usually steeped in the atmosphere of the essential facts of a cause of action which are the constituent ingredients of an enforceable right. A person in whom this enforceable right is vested, is the person that has the *locus standi* to sue.

[30] Furthermore, the issue of *locus standi* is at the crux of the principle of company law referred to as the rule in **Foss v Harbottle (1843) 2 Ha. 461**. This principle is to the effect that subject to certain exceptions, the proper plaintiff in an action in respect of a wrong alleged to be done to a Company or an Association of persons, is the Company or the Association of persons itself and not a shareholder or member of the Association.

[31] The take home message from the aforegoing, is that the question of *locus standi in casu*, is tied to the Applicant's pleading which must disclose a

cause of action vested in it. The pleading should indicate the injury which the Applicant suffered or it's right which has been violated by the conduct of the Respondents. The issue of *locus standi* therefore does not depend on the success or merits of the case, but on whether the Applicant has sufficient interest in the subject matter of the dispute. All that the Applicant is required to do is to plead and prove the facts establishing his right and obligation, in respect of the subject-matter of the suit. Therefore, the question of *locus standi* turns on the pleading of the Applicant. See **Swaziland Development and Savings Bank v Martinus Jacobu Dewald and Others Civil Case Nos 2034/2004, 1275/2011 and 1276/2011**. The question here is, did the Applicant satisfy the requirements as demonstrated above?

[32] Now, it is established on the pleading that the Applicant is a non-profit making organization. It is a *juristic persona* established in terms of its own constitution (annexure SNSC1) *"capable of suing and being sued in its own name and subject to the provisions of this constitution capable of performing all acts that bodies corporate may by law perform."*

[33] My understanding from the papers is that the Applicant is a statutory body, established by Government in conjunction with the different Sports Associations in the country in terms of its constitution, and vested with the hallmarks of a juristic person, which is the capacity to sue and sue *eo nomine*. It is clear from the tenor of the argument by the Respondents that they do not dispute the juristic personality of the Applicant in terms of its establishment. Their contention is that the Applicant was extinguished or replaced in the face of the Legal Notices establishing the 5th Respondent and

that the Applicant's vice chairperson lacks the authority to commence these proceeding. I will come to these matters anon.

[34] Let me first observe that the Applicant's constitution recites 12 objectives of the Council in Article 6 thereof as follows:-

> **"6.1.1 To be the national overseer of all issues related to sport in Swaziland;**
>
> **6.1.2 To develop promote, encourage, monitor and control all forms of sport and physical recreation in Swaziland;**
>
> **6.1.3 To advise the Ministry or any other authority on matters relating to sport;**
>
> **6.1.4 To facilitate and encourage co-operation among members and other organizations in and out of Swaziland on matters relating to sport;**
>
> **6.1.5 To ensure that the constitutions of members permit accessibility of the general populace into its membership;**
>
> **6.1.6 To undertake research, maintain a data bank and disseminate information on all matters relating to sport;**
>
> **6.1.7 To ensure effective co-ordination of international and sports events;**
>
> **6.1.8 To formulate policy on all matters related to sport in Swaziland;**
>
> **6.1.9 To develop and maintain sport infrastructure;**
>
> **6.1.10 To provide financial and other assistance to Members;**
>
> **6.1.11 To enforce the provisions of this constitution;**
>
> **6.1.12 To co-operate, by affillation or otherwise, with other organizations outside Swaziland whose objectives are similar to or enhance the objectives of Council;**

6.1.13 To perform such other acts as may be conducive to the development, promotion, regulation, monitoring and control of sport in Swaziland and any other act or activity ancillary to the above that may enhance Council in meeting its objectives."

[35] It is established on the papers that the Applicant entered into an MOU with the Government of Swaziland, the latest agreement which commenced on the 8th of July 2010.

[36] It is also established that in terms of the MOU, Government delegated its authority to implement the National Sports Policy to the Applicant. Applicant's terms of reference in line with the MOU was to facilitate and implement the National Sports and Recreation Policy vested in the Ministry of Sports, Culture and Youth Affairs in particular, the department of sports.

[37] In paragraph 13 of its founding affidavit, the Applicant articulated its powers under the MOU as follows:-

"13.1 Administrate and ensure National Sports Association in the country, are responsible for the promotion of developmental for sports.

13.2 Co-ordinate all national and international activities that involve sport.

13.3 Initiate sport programs and game to achieve government objectives.

13.4 Ensure maximum consultation with the Department of Sport through the Ministry of Sports Culture and Youth Affairs to achieve government objectives.

13.5 Initiate and co-ordinate existence of facilities and infrastructure for Sports.

13.6 Ensure that all objectives of the Council are promoted and achieved.

13.7 Ensure that Council does not partake in any action, in support of political activities by any individual party or group.

13.8 Ensure that the Council is recognized as a sport Statutory body in the country.

13.9 Approve grants-in-aid to registered associations, organizations and individuals for specific purposes upon receipt of the budget of the association or organization or individual."

[38] It appears that subsequent to the signing of the MOU the board of the Applicant was formed and that the Applicant had been exercising its powers pursuant to the MOU until round about 2013, when Government issued Legal Notice No. 124/2013, under the hand of Majozi V. Sithole, the Minister of Finance. Section 2 of the Legal Notice reads as follows:-

> **"The schedule to the Public Enterprise (Control and Monitoring) Act No. 8 of 1989 is amended in Category A Clause 31 by deleting and replacing the name "Swaziland National Sports Council" with a new name "Swaziland National Sports and Recreational Council"**

[39] It is important that I state here, that prior to legal Notice No. 124/12013, Government had in April 2012 issued Legal Notice No. 119/2012 which named the Applicant as a Public Enterprise in category A of the Public Enterprises (Control and Monitoring) Act. Suffice it to say that the Applicant in its papers vociferously complains about these two legal Notices as unlawful. It complains that the creation of the Swaziland National Sports and Recreational Council, 5th Respondent, was not done in accordance with law.

[40] It complains that the 1st Respondent in the wake of Legal Notice 124/2013 appointed a board for the 5th Respondent which is basically made up of the Applicant's Board members including its chairperson who is now also the chairperson of the 5th Respondent. Applicant complains that these activities of Government have prejudiced its rights by stultifying its day to day activities.

[41] Applicant further complains that the 5th Respondent has in the wake of its appointment dispossessed Applicant of its offices, staff members, office equipment, furniture as well as bank accounts. Applicant contends that it was in peaceful and undisturbed possession of these amenities prior to the invasion by 5th Respondent.

[42] The Applicant also contends that the 1st Respondent not only breached the terms and conditions of the MOU by appointing the 5th Respondent and transferring Applicant's duties and responsibilities to it, which the Applicant did not consent to in term of Article 13 of the MOU and without the sanction of Parliament, but for the 5th Respondent to invade its offices is another kettle of fish. It is an act of spoliation from which it demands immediate protection from the Courts.

[43] The Applicant claims that it still exists as an organization and has not been abolished. Its board is still in office. Therefore, it has a right to occupy its offices which it rented from its landlord as evidenced by the lease agreement annexure SNSC8. It has a right to its office equipment, staff members, furniture and bank accounts. It has a right to carry out its duties and responsibilities in terms of the MOU, however, this is not the case as the 5th

Respondent holds itself out to the general public as the body responsible for co-ordinating all national and international activities, including sports programs and games, so contends the Applicant. For instance, on the 16th September 2013, an article was published in the Times of Swaziland, where it was reported that on Saturday the 14th September 2013, the 5th Respondent had hosted an event at Jubilee Park "Shukuma Festival", as evidenced by annexure SNSC9.

[44] Furthermore, the 5th Respondent is now communicating directly with the Applicant's members and totally taking control of the Applicant's duties, as evidenced by annexure SNSC7, which is an electronic mail recently disseminated by the personal Assistant to the Chief Executive office of 5th Respondent, wherein the 5th Respondent claims to perform such duties, so complains the Applicant.

[45] The Applicant therefore contends that the Respondents have usurped its duties and responsibilities, thus violating its rights under its own constitution, the MOU as well as the Constitution of Swaziland Act 2005.

[46] It appears to me that the Applicant's pleading clearly discloses a cause of action and the constituent ingredient of an enforceable right. As a statutory body vested with the power to sue or be sued *eo nomine*, the Applicant has a right, if its properties are being taken away, to bring an action to protect its properties.

[47] The Applicant has a *locus standi* to protect its properties and to contend that its fundamental right against unlawful deprivation of property in terms of

Section 19 of the Constitution Act has been infringed upon. For the avoidance of doubts Section 19 of the Constitution Act states as follows:-

> **"(1) A person has a right to own property either alone or in association with others.**
>
> **(2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-**
>
> **(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health;**
>
> **(b) the compulsory taking of possession or acquisition of the property is make under a law which makes provision for-**
>
> **(i) prompt payment of fair and adequate compensation; and**
>
> **(ii) a right of access to a court of law by any person who has an interest or right over the property;**
>
> **(c) the taking of possession or the acquisition is made under a court order."**

[48] Furthermore, Applicant has a *locus standi* to contend that the appointment of the 5th Respondent was unlawful and unconstitutional.

[49] It has a *locus standi* to contend that its constitution and the MOU have been violated and it's rights and powers under the MOU have been taken over and given to the 5th Respondent.

[50] It is important I emphasize, that the fact of the Applicant having *locus standi* is also steeped in the atmosphere of the Constitution of Swaziland Act 2005. Section 14(2) thereof provides:-

> **"The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, the legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the Courts as provided in this Constitution" (emphasis mine)**

[51] The aforegoing provision is backed up by Section 35(1) which states that:-

> **"where a person alleges that any of the foregoing provisions of this chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress." (underline mine)**

[52] It appears to me that the combined effect of the above legislation encompasses the full extent of the judicial power vested in the Courts by the Constitution Act. Pursuant to it, the Courts have power to adjudicate on a justiciable issue touching on the rights and obligations of the person who brings the complaint to Court, whose rights have been infringed or injured or that there is a threat of such infringement or injury. This is such a case.

[53] The mere fact that Government now seeks to resile or has resiled from the MOU does not strip the Applicant of its juristic personality. It does not strip Applicant of the power to launch these proceedings to seek redress also in

respect of the rights of its thirty odd members, whose rights the Applicant clearly alleges in its papers are being violated by the acts of Government. As is extant from Article 6.1.10 of its constitution which I regurgitated in paragraph [34] above, one of the objects of the Applicant is to provide financial and other assistant to its members and to uphold its constitution. Its constitution generally identifies with the interests of its members.

[54] The questions as to whether the Applicant is a Government parastatal by reason of being given subvention by Government; whether the combined effect of Legal Notices Nos 119/2012 and 124/2013, is that they completely extinguished the Applicant in terms of article 17 of the MOU, as contended by Mr Kunene or that Legal Notice No. 124/2013 merely changed the name of the Applicant as contended by Mr Mamba; whether or not the Applicant and 5th Respondent are one and the same organization maintaining the same constitution; whether or not the MOU terminated on the 31st of March 2013; whether or not the 1st Respondent had the powers to appoint the 5th Respondent etc; are all issues that tend to the merits of this application which it is clearly undesirable for me to pronounce on at this stage of the proceedings.

[55] In light of the totality of the aforegoing, I hold that the Applicant has the *locus standi* to maintain these proceedings.

[56] In coming to this conclusion, I am mindful of the fact that both Mr Kunene and Mr Mamba made heavy weather of the absence of a resolution by the Applicant's board members or the members of the Associations affiliated to the Applicant, authorizing the vice chairperson Sikhatsi Dlamini, the

deponent of the founding affidavit to launch these proceedings. Infact, Mr Kunene in decrying the position of the vice chairperson in these proceedings, asked the question "Where is the chairperson?"

[57] He then contended that in the absence of the chairperson and a resolution, the vice chairperson is a disgruntled element who has no authority to initiate these proceedings. His grievance is embodied in the fact that he was not re-appointed on the board of the 5th Respondent, along with the other board members, as well as financial motivation. He thus embarked on this nefarious application in a bid to defeat the Respondents' due process, so Mr Kunene further argued. Mr Mamba also tendered argument along similar lines.

[58] It is my considered view, but with respect, that the posture of both Counsel in the peculiar circumstances of this case is clearly "hitting below the belt". I say this because the established facts on the papers are that the chairperson of the Applicant, Menzi Dlamini, cited in these proceedings as 4th Respondent, has been appointed also the chairperson of the 5th Respondent and has bluntly refused to deal with the Applicant.

[59] In any case, I wish to respectfully depart from the views expressed by both Counsel on the issue of the vice chairperson's authority. It is at variance with Applicant's constitution which is the instrument that regulates its internal operation. I say this because the Applicant's constitution decrees in clear and unambiguous words, that in the absence of the chairperson his duties vest in the vice chairperson. This appears in Article 14.1 of the constitution in the following words:-

"THE VICE CHAIRPERSON

The vice chairperson shall assist the chairperson in carrying out of duties of the office and in the absence of the chairperson, shall act in place of the chairperson."

[60] The duties of the chairperson are detailed in Article 13 of the Applicant's constitution. Of relevance to the exercise at hand are 13.1 and 13.2 below:

"13.1 The chairperson shall, subject to this Constitution convene and preside over all meetings of Council and of the Boards provided, however, that if the chairperson or vice-chairperson are not present at any meeting, the members present and entitled to vote shall choose one of their members to preside over the meeting.

13.2 <u>The chairperson or in his absence the vice chairperson or any other member appointed by resolution of the Board shall hold the power of attorney for Council</u>." (emphasis mine)

[61] It is inexorably apparent from Article 13 above, that under the Applicant's constitution the chairperson has authority to act on behalf of the Council. In the absence of the chairperson, the vice chairperson is constitutionally vested with the authority to exercise the powers of the chairperson by virture of Article 13.2. There is nothing in the constitution stating that the vice chairperson needs to be given the power of attorney to exercise the powers of the absent chairperson or requiring that he must be so authorized to act by a resolution of the Council. The power to act in the stead of the absent chairperson is automatic and arises by constitutional fiat, once the chairperson is absent. It is only a member of the Council who is not the

chairperson or vice chairperson that requires a resolution of the Council giving him power of attorney to exercise the powers of the chairperson and act on behalf of the Council.

[62] Assuming without conceding and for pure educational purposes, that I were to accept the Respondents' stanze that said resolution is required, it is established on the papers that the much vaunted resolution is stuck in the offices of Applicant, which Applicant alleges that Government has taken over and has refused to grant the Applicant any access into, in order to retrieve same. These facts appear in paragraph 24.3 of the founding affidavit in the following words:-

> **"Subsequent thereto, the Message by Mr Dlomo, indeed when I went to the applicant's offices in my capacity as Vice Chairman I was prevented from gaining access. Whenever, Applicant requested for documents, in preparation for this Court application which include minutes of the general Council and all other minutes and resolutions, the Applicant was prevented from getting same."**

[63] In the face of the aforegoing averrals, it will defeat the ends of justice to terminate these proceedings merely on the strength of the absence of the alleged resolution at this stage of the proceedings. That will not accord with the universal trend towards substantial justice, which is that justice can only be done if the substance of a matter is considered. Reliance on technicalities renders justice grotesque and sometimes leads to outright injustice. Justice should therefore not be sacrificed on the altar of technicalities. I say this in consideration of the fact that the issue of the resolution can still be remedied

or ratified. Therefore Respondents' contention that the Applicant must stand or fall on his founding affidavit in this respect, is clearly untenable.

[64] I find jurisprudential support for the aforegoing proposition in the case of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors, Appeal Case No. 23/2006,** where the Appeal Court speaking on a similar question made the following condign remarks:-

> **"32. The learned Judge a quo also referred to the decision in SOUTH AFRICAN MILLING CO LTD vs REDDY 1980(3) S 431 (SEC) for the proposition that the founding affidavit must contain all essential averments and that these cannot be supplemented in a replying affidavit. That decision has been criticized in a number of subsequent cases where it has either been distinguished or not followed, including one of the most recent cases on the subject viz SMITH vs KWNONOUBELA TOWN COUNCIL 1999(4) SA 947 (SCA). In that case the Supreme Court of Appeal in South Africa (per Harms JA) held that a party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Referring to the South African Milling Case, supra, the Court held that this was not a correct approach. It again stated that the rule against new matter in reply is not absolute but "should be applied with a fair measure of common sense." As Ebersohn J stated, the law in Swaziland is the same as that in South Africa. The court in this country should therefore also follow that approach.**
>
> **33. The approach in any event commends itself to me as being in accordance with sound commonsense. An allegation by a deponent that he is duly authorized to depose to an affidavit on behalf of a corporate body is generally not expected to be challenged and**

accordingly the source of his authorization is not usually set out by the deponent. If however, as occurred in casu his authority is challenged or denied in the answering affidavit, it would obviously be grossly unfair not to allow the deponent to set out the source of his authority. Fairness to the parties dictates this (see per Holmes J, as he then was, in MILNE N.O. vs FABRIC HOUSE (PTY) LTD 1957 (SA 63(N) at 65A)

34. In Baeck's case, in an application for an interdict and other relief the respondent challenged the authority of the deponent to the founding affidavit, one Keller, to institute the proceedings on behalf of the applicant, a company. The applicant sought to cure the deficiency by ratification having a retrospective effect. Goldstone J held as follows:

> **'In the present case Keller alleged incorrectly that he had authority to represent the applicant. If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach. Indeed, it is not disputed that the applicant could start again on the same basis, supplemented as needs be, to establish the authority of Keller.**
>
> **Accordingly, I am of the opinion that the fact alone that the question of ratification has been raised for the first time in reply, in the absence of prejudice to the first respondent, is not fatal to the success of the application. The Court has a discretion to come to the aid of the applicant.'**

35. **That is precisely the position that has arisen in this case. Nkabinde averred that he was duly authorized to launch the application and depose to the founding affidavit. He annexed a resolution in support of that. His authority was challenged in the respondent's answering affidavit on the basis that the founding affidavit was signed and sworn to the day before the resolution was passed. Nkabinde was, in my view, clearly entitiled in his replying affidavit to meet that challenge. Moreover, he sought to cure any defect, if indeed there was one, by having his actions ratified retrospectively. Again I agree-and find abundant support for this in Baeck's case-that he was entitled to do so in his replying and supplementary affidavit.**

39. **The learned Judge a quo with respect, also appears to have overlooked the current trend in matters of this sort, which is now well recognized and firmly established, viz not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decisions of cases on their real merits (see e.g. the dicta to that effect by Schreiner JA in <u>TRANS-AFRICAN INSURANCE CO LTD vs MALULEKA 1956(2) SA 273(A) at 278G; FEDERATED TIMBERS LTD v BOTHA 1978(3) SA 645(A) at 645C-F; NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS v GREYVENOUW CC AND OTHERS</u> 2004(2) SA 81(SE). In the latter case the Court held that (at 95F-96A, par 40):**

> **'The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs'**

40. **The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some judges to uphold technical points in limine in order it seems, I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged.**

41. **In the present case the defect, if such it was, in the Applicant's papers was that he had sworn to his affidavit a day prior to the formal resolution of his company authorising him to do so. But the notice of motion, of which such affidavit was the founding document, was only served and filed on the same day that the formal resolution was passed. This is a matter obviously highly technical in nature. By refusing to allow the applicant to remedy it, and not approaching the matter "with a fair measure of common sense", the Court *a quo* afforded the respondent no material advantage as fresh papers to remedy the defect could immediately thereafter have been prepared and filed by the appellant. It simply postponed at much cost the day of possible reckoning (cf the remarks in this regard of Harms JA in Smith's case, supra).**

42. **In any event, the Court a quo, again exercising its discretion in a common sense manner, should have had regard to the replying affidavit in which, the directors of the appellant clearly ratified Nkabinde's actions. In MERLIN GERIN (PTY) LTD v ALL CURRENT AND DRIVE CENTRE (PTY) LTD 1994(1) SA 659 (c) at 660 I-J, Conradie J, faced with a situation similar to the present, said in a statement approved by the Court of Appeal in Smith's case:**

> **'Where---the resolution of the applicant's board has only to be submitted to be accepted, there is really very little harm in allowing an applicant to put his papers in order in this way'**

> **And as far back as 1944, a notice of appeal in a case by an official of a trade union was filed on 20 October 1944 but the resolution of the union authorizing him to launch appeal proceedings on its behalf was only taken on 23 October 1944. That resolution was held clearly to amount to an effective ratification by the union of the act which had been done on its behalf without prior authority (see GARMENT WORKERS UNION OF THE CAPE AND ANOTHER v GARMENT WORKERS UNION AND ANOTHER 1946 AD 370 at 378).”**

[65] It follows from the exposition of the Appeals Court above, that since the vice chairperson alleges that he is authorized to depose to the affidavit on behalf of the Applicant by virtue of a resolution passed in an extraordinary meeting of the Council held on Wednesday, the 10th July 2013, which resolution he alleges is stuck in the office of the Applicant, now in the possession of the 5th Respondent, and to which Applicant has no access, the Applicant should be given the opportunity to cure the issue of his authority by ratification having a retrospective operation. I see no prejudice that the Respondents could possibly suffer by this course.

[66] However, this course is not necessary as I have hereinbefore abundantly demonstrated. This is because the power of the vice chairperson to act for the Applicant in the absence of the chairperson, is clear from the Applicant’s constitution. The vice chairperson has a vested power of attorney to act in these circumstances. I so hold.

[67] I now turn to the point taken on urgency. This is a question of statute. It is governed by Rule 6(25)(a) and (b) of the Rules of the High Court, which is couched as follows:-

> **"(a) In urgent applications, the Court or a Judge may dispense with the forms and service provided for in these Rules and may dispense of such matter at such time and place in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as the Court or Judge as the case may be, seems fit.**
>
> **(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, <u>the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he would not be afforded substantial redress at a hearing in due course."</u> (underlining added)**

[68] The rule is that the facts urged by the Applicant in aid of the requisite underlined factors encapsulated in Rule 6(25)(b) ante, must be weighty, and not self contrived or whimsical. It is by reason of this requirement that the Respondents deprecate the urgency advanced by the Applicant as self contrived. Their grouse is that the Applicant had full opportunity to commence these proceedings in the normal course upon becoming aware of the appointment of the 5th Respondent on the 10th of July 2013, as per its own showing in its papers. I have hereinbefore canvassed the Respondents' grouse in extenso. It bears no repetition.

[69] Now, notwithstanding the fact that the 5th Respondent was appointed on the 10th of July 2013, the Applicant alleged other factors which he contends

render this application urgent. They appear in paragraph 32 of its affidavit and are best summarized as follows:-

1. The Applicant is prejudiced by the deprivation of its property.

2. The 5th Respondent is now communicating directly with Applicant's members potraying itself as discharging the functions vested in Applicant in terms of the MOU. This has caused considerable confusion to the Applicant's operation as evidenced by annexure "SNSC7"

3. The Applicant is a non profit making organization with over thirty affiliates, being sports Associations. It can no longer discharge its obligations in terms of its constitution. This is prejudicial to its affiliates who subscribe to the Applicant.

4. The Applicant is currently unable to process grants and funding for its members' various sporting activities due to the spoliation. An immediate example is the case of Equestrian Federation who has submitted application for funding for an event which was meant to have begun on Monday 16th September 2013. This is borne out of the confirmatory affidavit of Kate Reilly who is the chairperson of the Equestrian Federation.

5. The Applicant would not be able to obtain the relief it seeks, if it is to follow the normal time limits in instituting application before the Court. This is due to the fact that by the time the matter is ripe for hearing, if the normal time limits are followed, more damage would have been done to the Applicant. The 5th Respondent, in that event, would have had the opportunity to cement itself in the Applicant's premises. It would have probably accessed the Applicant's bank account and spent money to the Applicant's prejudice. In aid of this allegation of impending interference with its bank account, the Applicant averred as follows:-

> "
>
> **-30-**
>
> **The 4th Respondent has also committed the following unlawful acts in relation to our bank account at Swazi Bank;**
>
> **30.1 He has caused to be issued a fraudulent resolution which he has submitted to the bank purporting that the Applicant has resolved to change its name to the Swaziland National Sports and Recreation Council and has represented to the bank that the applicant has agreed that its funds be transferred to the 5th Respondent, when this is not the fact.**
>
> **30.2 The 4th Respondent has submitted this resolution which is only signed by himself. The 6th Respondent has not acceded to his request but has ordered that the said resolution must be signed by the other members of the board.**
>
> **30.3 This serves to demonstrate that this matter is not only urgent but there is an apprehension of harm by the 4th |Respondent and his team. If this court does not grant this interdict, he may persist on his attempt to gain access to the applicant's bank account. It is proper that the court issues the interdict."**

[70] It appears to me that there is much force in Mr Magagula's contention that the aforegoing allegations of fact, define the urgency in this matter.

[71] In any case, this being a spoliation proceedings, is urgent by its very character. Where a party alleges unlawful dispossession of its property, the law, in my respectful view, must swing into action as a matter of urgency to redress the wrong alleged.

[72] The case of **Henwood Humphrey v Maloma Colliery Ltd and Another (supra)** urged by Mr Kunene cannot, with respect, avail the Respondents. This is because the facts of that case are easily distinguishable from the facts of the instant proceedings. In that case, which I straightaway note was not a spoliation proceedings, the Applicant had rested on his oars for 18 months after he became aware of the injury complained of before launching the proceedings. He rather contented himself with negotiations with the Respondent. The Applicant also failed to meet the requirements of Rule 6(25)(b) in his affidavit. The Court rightfully in my view, refused to enroll the application in the premises of urgency. This is not such a case. The odd 2 months delay from 10th July 2013 when the 5th Respondent was established to 23rd September 2013 when the proceedings were launched, cannot be viewed as unreasonable delay sufficient to defeat urgency, in the peculiar circumstances of this case see **Dockside Panelbeaters CC v Don Pedro CC t/a Dockside Panelbeaters And Others, Case No. 1207/2004 (Eastern Cape Division).**

[73] I am afraid that the same fate must befall the case of **Makhowe Investment (Pty) Ltd v Usuthu Pulp Co Ltd (supra)**. In discharging the *Rule nisi* which the Applicant had previously obtained, the Court held as appears in para (3) of that case on page 85:

> **"That the Applicant procured orders for urgency and for interim relief without making full and frank disclosure and did thereby abuse the process of the Court and thereafter, to a degree, tried to sustain its position vexatiously"**

[74] This is not the position *in casu*.

[75] Similarly, the question of the non-joinder of the Minister of Finance is an argument for another day. It must extinguish in its cradle. This is due to the fact that the presence of the Attorney General, the 3rd Respondent, cited herein in his official capacity as the legal representative of the Government of Swaziland, renders the proposed joinder of the Minister of Finance, one of convenience. It can thus be dispensed with.

[76] In the same vien, I am at pains to comprehend the basis for the contention on the non-joinder of the 5th Respondent's members. I therefore refuse to condescend to this line of argument.

[77] In light of the totality of the aforegoing, the point taken *in limine* on *locus standi*, urgency and non-joinder are unmeritorious. They fail.

[78] I now turn to the interim order which the Applicant contends for in terms of prayer 5 of the notice of application. I intend to make short work of this issue.

[79] The established principle of law which serves as a compass to the Court in an application for an interdict, is as espoused in the celeberated case of **Setlogelo v Setlogelo 1914 AD 221 at 227**. This is that the Applicant to an interdict must demonstrate the following:-

(1) a clear right;
(2) injury actually committed or reasonably apprehended;
(3) the absence of similar protection by another remedy.

[80] It is now however the overwhelming judicial accord that in an application for an interim interdict, all that the Applicant has to show to satify (1) above is a *prima facie* right, though open to some doubts.

[81] It is inescapable from the conclusion I reached on the points on *locus standi* and urgency, and my detailed anology preceding same, that the Applicant has satisfied these requirements.

[82] It has shown that he has a *prima facie* right to the remedy sought, as I have abundantly exposed in this judgment. He has shown that he has actually suffered injury by the Respondents taking over his property, office, equipment, personnel, duties and responsibilities, as well as, the apprehension of interference with its bank account.

[83] On the whole, I see no alternative remedy open to the Applicant but to approach this Court for relief.

CONCLUSION

[84] In these premises, I hereby make the following order:

1. That the point *in limine* taken by the Respondents on lack of *locus standi*, urgency and non-joinder be and are hereby dismissed.

2. That in terms of prayer 5 of the notice of application, the 4th and 5th Respondents be and are hereby interdicted from conducting the Applicant's bank account No. 77017919410 held with the 6th Respondent, pending finalization of this application.

3. Costs to follow the event against the 1st, 2nd, 3rd, 4th and 5th Respondents, jointly and severally each paying the other to be absolved.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……DAY OF ……..….2013

OTA J

JUDGE OF THE HIGH COURT

For the Applicant:	B. Magagula
For the 1st, 2nd and 3rd Respondents:	V. Kunene
For the 4th and 5th Respondents:	L. R. Mamba
For the 6th Respondent:	No appearances