IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3628/2000

In the matter between :

CITY COUNCIL OF MANZINI	APPLICANT
AND	
DALE INVESTMENTS (PTY) LTD	RESPONDENT
CORAM	SHABANGU AJ
FOR APPLICANT	MR B. MAGAGULA
FOR RESPONDENT	MS. VAN DER WALT

26th August, 2004

The applicant, the City Council of Manzini seeks in these proceedings, an order

1. "1. That the Respondent is to remove the illegal structures of Erf k. 277 Ngwane Street, Manzini so as to comply with the building plans approved by the Applicant under minute 36/02 of 1986 and more particularly to restore the parking bays as indicated therein within fourteen (14) days or such time as may be set by the court.
2. Failing the removal of the structures named above within the time stipulated by the court that the Deputy Sherrif for Manzini be authorised and directed to take all such steps as may be necessary to have them removed.
3. That Respondent pays the costs of this application.
4. Further and or alternative relief."

I appears to be common cause between the parties that in 1986 and on the basis of a plan approved by the applicant, the respondent erected a building on Erfk/277, Ngwane Street, Manzini described by the applicant in its founding affidavit as the premises. It also appears to be common cause that the aforementioned plan as approved by the applicant made provision for fourteen (14) parking bays. The building erected on the premises was for commercial purposes. It further appears to be common cause between the parties that on 2nd June, 1999 another plan was lodged by the respondent. In the latter application the respondent sought approval of plans for extensions which the respondent sought to effect to the building and premises in accordance with annexure "TP2" of the applicant's founding affidavit. This latter application was apparently approved by the applicant under minute number 102/07 of 1999. The respondent whilst admitting the above states at paragraph ten of its answering affidavit that annexure "TP 2" relied upon by the applicant requires seven, and not fourteen parking bays. Then in paragraph ten of its founding affidavit the deponent who describes himself as the Chief Executive Officer of the Applicant states;

"Subsequent to the approval of the plans, an inspection of the premises revealed that the fourteen parking bays provided for in the plans for the original building had been abolished by Respondent who had built shops in their place. "

The respondents' response to the abovequoted paragraph ten (10) of the founding affidavit is contained in paragraph eleven of the respondents' answering affidavit and reads as follows;

"11, The Respondent admits that shops were built on a certain area, but puts the plaintiff to the proof

that such area was designated for parking spaces. As aforestated the applicant has failed to annex a copy of the plan it purports to rely on, "

Even though the parties addressed certain points in limine they were both in agreement at the conclusion of argument that they had also argued the merits of the application and expect me, in the event the points of law in limine are not upheld to determine who should succeed on the merits. The first point of law in limine taken by the respondent is that "the application is fatally defective in that there is no allegation to the effect that this... court has jurisdiction to entertain the matter." Relying on the unreported decision of this court in civil case number 624/2000, namely the matter of BEN M. ZWANE V. THE DEPUTY PRIME MINISTER & ANOTHER delivered on 24th March, 2000, Ms

Van der Walt argued that the founding affidavit must contain an express allegation that the court has jurisdiction and that in the absence of such express allegation the court is obliged to dismiss the application which according to counsel can be said to be fatally defective. This is a very strange proposition indeed. It appears to be accepted as trite in a long line of decided cases, and in the textbooks on our civil practice that facts must be set out which if proved or from which if undisputed it can be concluded that the court has the necessary jurisdiction to entertain the proceedings and that it is neither sufficient nor is it necessary to merely state the legal conclusion of jurisdiction. A legal conclusion would be a statement in the party's pleading or affidavit which simple states that "...the court has jurisdiction to hear the matter...". On the other hand all the textbook writer's that are quoted by Mr, Justice Masuku emphasise that what is required is that allegations of fact indicating that the court has jurisdiction is all that is required. See BEN M. ZWANE V, THE DEPUTY PRIME MINISTER & ANOTHER supra at page three to four and the references therein. The ratio or principle of the decision in the Ben Zwane case referred to above may be expressed in accordance with the formulation by HARMS in his "CIVIL PROCEDURE IN THE SUPREME COURT" quoted and relied upon by Mr. Justice Masuku in the Ben Zwane case which is that;

"In any summons or founding affidavit, the necessary factual allegations relating to jurisdiction must be made. It is not sufficient to state the legal conclusion of jurisdiction. "

See page 4 of the Ben Zwane judgement.

Earlier on the learned judge, that is, Mr Justice Masuku quotes from ERASMUS, SUPERIOR COURT PRACTICE at B-37 to 38 wherein it is stated;

"The facts must be set out simply, clearly and in chronological sequence, and without argumentative matter in which are to support the notice of motion. The statement of facts must contain the following information:

(i).....
(ii) the facts indicating the court has jurisdiction."

The learned judge then went on to conclude

"...in this case neither factual allegations nor legal conclusions of jurisdiction have been stated in casu. The allegations must appear in the affidavit and the court must not be left to deduce that it has jurisdiction. "

It seems to me that the principle of the decision as quoted and relied upon by the learned judge in the Ben Zwane case is a principle of our practice long recognised and known in the cases. If I apply that principle in the present matter it seems to me that there can be no doubt that the jurisdiction of this court has been properly pleaded in the applicants' founding affidavit. I do not need to comment on whether, with the greatest of respect, the learned judge in the Ben Zwane case correctly applied this principle. Indeed contrary to what the learned judge concludes at page four of his judgement it is for the court to deduce whether it has jurisdiction from the factual allegations made. It seems to me that the applicants' attorney in the Ben Zwane case was correct in his submission that "it is unnecessary to

plead conclusions of law but [that] the court can determine from the facts set out in the founding affidavit and the relief prayed for that it has jurisdiction to entertain the application." That proposition is the only one consistent with the passages quoted and relied upon by the learned judge in the Ben Zwane and is consistent with all known principles of pleading. After all the concept of jurisdiction has various references or connotations. Jurisdiction of the court may relate to (1) the parties, in other words "jurisdiction over persons", (2) jurisdiction to grant the particular relief sought in the action or application, (3) jurisdiction to enter into the hearing of the subject matter of the proceedings etc. The concern expressed by the learned judge in the Ben Zwane case to the effect that "it is not even stated where the applicant resides" was no valid criticism of the applicants' papers because a party who institutes proceedings before any court submits thereby to the jurisdiction of the court regardless of where he or she resides. The fact that a plaintiff or applicant in proceedings instituted before court has not disclosed his place of residence should not affect the courts' jurisdiction to hear the matter. On the other hand the applicants or plaintiff's papers must show that the court in which the action is instituted has jurisdiction over the person of the defendant or respondent which may be shown by an allegation that the respondent or defendant resides within a specified area located within the court's jurisdiction.

The "necessary factual allegations relating to jurisdiction" referred to by HARMS supra would ordinarily therefore be allegations relating to the respondent's or defendant's place of residence or business. This would also include the location of a companies registered

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office. Other allegations relating to jurisdiction would be, where the plaintiff's or applicant's cause of action is contract, an allegation that the contract was concluded in Manzini. Once that allegation is made it is not necessary to include in one's pleading a statement that "the court has jurisdiction...", Manzini being a place within the jurisdiction of the court it would amount to a sufficient allegation relating to jurisdiction to simple allege that the contract was concluded in Manzini - and that the defendant or respondent resides in Manzini. Similarly if the cause of action is delict then the necessary allegations relating to jurisdiction would have been made if the place of the occurrence of the accident, such as an allegation that "the defendants motor vehicle collided with the plaintiff's motor vehicle on Ngwane Street in Manzini", has been made. The court will be able to deduce that it has jurisdiction because of the allegation that the place of the accident is in Manzini which town is within the jurisdiction of the court. It is for the court to satisfy itself that from the facts pleaded if those facts are undisputed or are unchallenged the legal conclusion would follow that the court has jurisdiction. It being for the court to decide the question whether it has jurisdiction it does not assist a plaintiff or applicant to simple state in his papers that "...the court has jurisdiction..." To do so is to state a legal conclusion or legal proposition as contemplated by the learned authors relied upon in the Ben Zwane case. It is not very clear in the Ben Zwane case what essential allegation relating to jurisdiction was considered to be missing by the learned Judge. However, if counsel is correct that what the learned Judge considered to be missing was a statement that "the court has jurisdiction...", then the courts' decision would have been clearly wrong. Indications that this is what the learned judge had in mind is the statement which forms part of his conclusion at page four of the judgement to the effect that "... the court must not be left to deduce that it has jurisdiction." As already observed if that is what the learned judge had in mind he was clearly and obviously wrong in his application of the principles discussed by the learned authors upon whom he relied. I am not bound to follow such an approach, which approach is clearly inconsistent with principle and the formulation of the principles as discussed in the text relied upon by the learned judge himself. In the circumstances the first point of law in limine cannot be upheld and it therefore fails.

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The second point of law in limine taken on behalf of the respondent is that "the application is fatally defective in that it does not disclose a cause of action. This point is developed in paragraphs 5.1 and 5.2 of the answering affidavit wherein it is formulated as follows;

"In paragraph 17 there is a mere bald allegation of illegality concerning 'plans approved by the Applicant."

5.2 There is no allegation to the effect that the applicant, in law or otherwise, was bound by any such plan or plans, and if so, on what basis."

It is difficult to understand the nature of the complaint raised by the respondent in paragraph 5.1 and 5.2. There is no basis for the proposition made on behalf of the respondent that there must be an allegation that "the applicant, in law or otherwise, was bound by any such plan or plans, and if so on what basis." This complaint may relate to matters which arise on merits of the application. The fact of the matter is that the Application brought by the applicant has as its basis section 10 of the Building act 34 of 1968 which provides for the following;

"Permit to build, demolish or change use.

(1) No person shall –

a) conduct operations for the construction or demolition of a building; or

b) change the use of a building unless there has been obtained from the local authority a permit for the construction, demolition or change in use, as the case may be, but nothing in this section applies to any operations for the alteration of a building which consist solely of the fitting or a fixture of such kind as may be prescribed by the Minister for the purposes of this subsection.

Then the subsection 2 reads

"A person who performs an act described in subsection l(a) or (b) shall do so in accordance with the plans approved, and any conditions contained in the permit issued, by the local authority, unless the local authority agrees in writing to a variation of the plans or conditions. "
In light of the abovequoted section of the Building Act, 34 of 1968 it is clear that the section obliges any person who either changes the use of a building or conducts operations for the construction or demolition of a building, to do so in accordance with plans approved or any conditions contained, in the permit issued by the local authority, unless the local authority agrees in writing to a variation of the plans or conditions. In other words the person described in Section 10 (1) (a) or (b) of the Building Act is bound

as a matter of statute law to build in accordance to the plans approved by the local authority, in this case the applicant and in accordance with any conditions contained in the permit issued by the local authority allowing the person to build, demolish or change use as the case may be. This being a statutory requirement there is no need to plead that the "applicant" or the respondent for that matter is bound to the plans because whether any person is so bound is a matter of law. In the circumstances this point must also fail. Similarly the point taken in paragraph seven of the respondents' answering affidavit ought to fail on the same basis. The point of law raised in paragraph six of the answering affidavit appear and were indeed described by the respondents' council to be based on the false assumption that the applicants' case is founded on the Manzini Development Code of 1991, a document which is equated with a Town Planning Scheme promulgated under the provisions of the Town Planning Act 45 of 1961. As already observed above the applicants' case is founded on the Building Act, 34 of 1968. In light of this this last point must fail also.

Turning to the merits counsel for the applicant submitted that the applicants' case was founded on section 10 of the Building Act, 34 of 1968, as already observed herein. In a letter dated 17th May, 2000 the respondent wrote to the applicant in connection with the dispute that has given rise to the present proceedings and stated its position as follows in paragraphs seven to twelve thereon;

"7. The area in which the parking is required is part of the original structure, which originally had parking spaces in the basement.

8. However, during the course of time vendors have requested that the parking (which was never used in any event) be converted to shop premises as they were in need of same.
9. We felt that this would be the normal thing to do as these people were in need of premises and we had an empty garage/parking lot.

10. We converted the premises into shops by dividing the parking lot into a number of small closed rooms. This was don in the eighties.

11. We felt that we had done the honourable thing. However, we were told by the Council to have the shops converted into parking tots.

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12. We submit respectfully that we do not need parking spaces as our tennants and customers do not use vehicles. Furthermore the type of clientele we attract is normally the type that is from boarding a bus or has alighted from same."

The contents of annexure "TP7" from which the preceding passage is quoted is admitted by the respondent to be part of the correspondence which passed between the parties, namely the Manzini City Council and Dale Investments (pty) Ltd in relation to the dispute. From this letter it is clear that the respondent did construct without a permit and a plan approved by the Applicant shops contrary to the plans approved by the Applicant. The respondent appears to have embarked on this without either preparing plans for the shops or seeking approval of the of the applicant as the responsible local authority. In Annexure "TP2" of the applicants' founding affidavit is an approved plan reflecting four shops and seven parking bays. It has been argued on behalf of the respondent that the relief sought by the applicant which relief is for an order, which seeks to ensure that the structures on Erf K. 277 be in compliance with building plans approved in 1986, whereas there has been another plan approved in 1999 cannot be granted. The plans approved in 1999 reflects that there would be 7 parking bays. It would in my view be inappropriate to make an order directing that the structures on the premises be structures which comply specifically with a plan approved in 1986 when there is in existence another plan which the applicant approved in 1999 which may have ammended the 1986 plans. A further difficulty for the applicant is that there is no evidence in its founding affidavit which explains how the ammended plans relate to those of 1986 and to the structures on the actual premises. It appears to be fairly clear and indeed to be common cause from paragraph fourteen and annexure " TP6" of the founding affidavit that there are structures which the respondent has constructed without a permit and approved plans, on the premises. It does not appear to follow however that the situation can be remedied by requiring the structures on the premises to be in compliance with plans approved in 1986. The illegal structures cannot be identified with reference to the 1986 plan said to have been approved by the applicant under minute 36/02. In granting any kind of relief for the removal of the illegal structures the level of certainty on the proper identification and description of the structures to be removed must leave no room for doubt as to what these structures are and the parties must not be left in a position wherein they might have to argue on the identity of the structures to be removed. Regrettably I cannot assist on the

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proper identification of these structures which the applicant wishes to have removed, in such a way that an order may be granted to the applicant under the prayer for further and or alternative relief. In the circumstances I have no alternative but to dismiss the application, inspite of it being common cause that the respondent has built on its premises some structures without either a permit or an approved plan or both. The order I make therefore is to dismiss the application with costs.

ALEX S. SHABANGU

ACTING JUDGE