IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1911/2008

S & B CIVILS ROADS (PTY) LTD Applicant

And

MUNICIPAL COUNCIL OF MANZINI 1st Respondent

INYATSI CONSTRUCTION LIMITED 2nd Respondent

Coram: S.B. MAPHALALA – J

For the Applicant: Advocate M. Van Der Walt (Instructed by Currie and Sibandze Attorneys)

For the 1st Respondent: Advocate R Wise SC (Instructed Robinson Bertram)

For the 2nd Respondent: Mr. J. Rodriques

JUDGMENT
30th June 2008

[1] The Applicant S & B Civil Roads (Pty) Ltd, a company duly registered and incorporated in accordance with the Company laws of the Kingdom of Swaziland has filed this application under a Certificate of Urgency against the Respondents. The 1st Respondent is the Municipal Council of Manzini, a local authority duly established in terms of the Urban Government Act No. 8 of 1969 (hereafter referred to as the "Act" with its principal place of business situate at Ngwane Street, Manzini. The 2nd

Respondent is Inyatsi Construction Limited, a company registered and incorporated in accordance with the company laws of the Kingdom of Swaziland.

[2] The application is for an order in the following terms:

1. That the usual forms and service relating to the institution proceedings be dispensed with and that this matter be heard as a matter of urgency.

2. That the Applicant's non-compliance with the Rules relating to the above said forms and service be condoned.

3. Pending the determination of proceedings to be instituted by the Applicant against the 1st Respondent for the furnishing of information and documentation and setting aside of the 1st respondent's decision to award its Tender No. 27 of 2007/2008 to a party other than the Applicant, that:

3.1. The award of the said tender and/or the execution of the contract including commencement and execution of the works forming the subject matter of the tender, be suspended; and

3.2. The *status quo ante* of the parties prior to the consideration of the tenders submitted be restored.

4. That the Applicant institutes proceedings for the relief referred to in paragraph 22.1 of the Founding Affidavit herein (furnishing of information and documentation) within 6 weeks of date of this order.

5. That the Applicant, within 6 weeks of the date of final determination of the relief referred to in 4 above, institutes proceedings for the relief referred to in paragraph 22.2 of the Founding Affidavit (setting aside of the award of the tender).

6. Costs of suit against the 1st respondent only, including the costs of

Counsel as certified in terms of High Court Rule 68 (2).

7. Such further and/or alternative relief as the above Honourable Court may deem fit, and that the accompanying affidavit of Derek Robert Du Plessis will be used in support thereof.

[3] The application is founded on the affidavit of its director one Derek Robert Du Plessis where the material facts of the dispute are outlined.

[4] The 1st Respondent opposes the application and has filed the opposing affidavit of one Ellinah N. Wamukoya who is employed by the 1st Respondent in the post of Acting Town Clerk. In the said affidavits the material facts in opposition are addressed where three points *in limine* have been raised. These points are the subject-matter of the present judgment.

[5] The points *in limine* read as follows:

5.1. *In limine* it will be argued on behalf of he Manzini Municipality that Applicant is barred from bringing this application by virtue of the provisions of Section 116 of the Local Government Act, No. 8 of 1969 (and to which I shall refer as the Act") in that it has neither given 30 days notice to the Municipality prior to the bringing of these proceedings, nor, in the absence of having given such notice, ahs it applied for or been granted special leave to do as is required by Section 116 (3).

5.2. To the extent that the Applicant has in sub-paragraph 39.2 of its Founding affidavit adverted to the requirement of having to give 30 days notice, this has been done incidentally to its averments as to why the application should be heard as one of urgency. It will be submitted that this is insufficient in law and does not constitute a substantive application for special leave as is required by the Act.

5.3. In the premises it is submitted that the application should be dismissed on this ground alone. However, I have been advised that lest this Honourable Court should hold differently it is advisable that the 1st Respondent should 'plead over' as it were and that I should also now deal with the merits of this application so far as is necessary.

[6] In arguments before me Counsel for the 1st Respondent advanced very forceful arguments to support the above-cited points *in limine.* The essence of these submissions is that the court ought to follow what was decided by this court on previous cases that of *Ray Sibandze vs The Attorney General - Civil Case No. 450/1993 per* Hull CJ and that of *Churchill Fakudze vs The Chairman of the Council in Committee of the Manzini City Council - Civil Case No. 42/2006 per* Annandale ACJ (as he then was).

[7] The gravamen of the argument by Advocate Wise SC is that the Applicant cannot operate outside the provisions of Section 116 of the Local Government Act No. 8 of 1969.

[8] The said Section provides the

following: **Limitation of actions**

116. (1) No legal proceedings of any nature shall be brought against a Council in respect of anything done or omitted by it after the commencement of this Act, unless such proceedings are brought before the expiry of twelve months from the date upon which the claimant had knowledge or could reasonably have had knowledge of he act or omission

alleged.

(a) **No such action shall be commenced until thirty days' written notice of the intention to bring such proceedings have been served on the Council, and particulars as to the alleged act or omission shall be clearly and explicitly given in such notice.**

(b) **The High Court may, on application by a claimant debarred under subsection (1) or (2) from instituting proceedings against a Council, grant special leave to him to institute such proceedings if it is satisfied that:-**

(c) **the Council against which the proceedings are to be instituted will in no way be prejudiced by reason of the failure to institute the proceedings within the stipulated period or by reason of the failure to give or the delay in giving the required notice; or**

(d) **Having regard to any special circumstances, the person proposing to institute the proceedings could not reasonably be expected to have complied with the requirements of subsection (1) or (2).**

[9] *Mr Wise* cited a very important *dictum* by Nicholas J in the South African case of *Prinsloo vs Johannesburg Council 1969 (2) S.A. 335 (W)* which also relied upon by the

Applicant in argument. The learned Judge in that judgment cited a decision by Holmes J in *Mamayisa vs Durban Corporation 1955 (4) S.A. 208 (N)* where the court was concerned with the question whether the Appellant was obliged to give notice to a local authority before instituting proceedings for an order restraining the local

authority from ejecting the Appellant and her tenants and demolishing two cottages, pending the decision of an action to be brought. The learned Judge at 21 OF - H said:

> **"The language of sec. 254 (2) is plain and unambiguous and its meaning is clear. No legal proceedings of any nature against a local authority shall be commenced until one month after written notice has been served. The fact that this may sometimes cause hardship is no ground for withholding its plain meaning. The Court cannot legislate to meet cases of hardship. That is a matter for the legislature. I agree, with respect, with the remarks which my brother SELKE made in *McDermott and others v Durban Transport Management Board and others, 1955 (2) S.A. 191 (D)* at p. *198,* where he said that, although it may appear starling and might be unfortunate if sec. 254 (2) has the effect of preventing anyone from obtaining an interdict against a local authority save on.**

[10] The learned Senior Counsel went through the Swaziland legislation and the South African legislation on the point with admirable insight to the general arguments that Applicant should have proceeded by way of subsection 3 of the Act.

[11] On the other hand *Advocate Van Der Walt* in her thorough Heads of Argument also relied on the *dictum* in *Prinsloo vs Johannesburg City Council (supra)* that the object of an application for an interlocutory interdict is "... **to protect the rights of the complainant party pending an action to be brought by him to establish the respective rights of the parties. Its effect is to "freeze" the position until the court decides where the right lies".**

[12] Counsel for the Applicant also referred the court to the case of *Benning vs Union Government 1914 A.D. 180* at page *185* where it was held that:

> **"The words "no action" are not so plain and unambiguous that it is not legitimate to have regard to the starling consequences of, and the real possibility of grave hardship and injustice which would result from a holding that "action" as used in Section 172 includes proceedings for interlocutory relief. Having regard to this, and of the opinion that a claim for interim relief against a local authority in the Transvaal is not an "action" within the meaning of Section 172 (2) of the Local Authority Ordinance".**

[13] The Applicant further contended that Section 33 (1) of the Constitution provides that a person aggrieved with the decision of an administrative authority has a right to apply to court. This is all the more reason why the said Section 116 should be strictly construed, and not be extended beyond the cases to which it expressly applies. It then follows that the said Section 116 is not applicable to an application for interim relief *pendente lite* where it is sought to maintain the parties *status quo ante* to hold otherwise would mean, for instance, that a party whose house is about to be unlawfully demolished by the Council, must give 30 days' notice before it can seek an interlocutory interdict staying the proposed demolition. This would clearly constitute an absurdity and a grave injustice.

[14] The ultimate question for decision by this court is whether an application for "interim relief such as the present application is excluded from the ambit of the enactment cited above. It appears to me after assessing the arguments of the parties that this is not so.

[15] The answer to this issue lies in determining the proper meaning to be given to the enactment; i.e. it is a question of interpretation which involves ascertaining the

intention of the enactment. The court is required to determine the legal meaning intended by the legislator. The starting point is the phrase **"legal proceedings of any nature"** as used in the first line of sub-section (1). This is a very wide and all embracing phrase. It would clearly include actions in the narrow sense that is, proceedings commenced by summons and which envisage and necessitate the hearing of testimony and motion proceedings of all kinds, including an application for interim relief such as the present case.

[16] The next question to be asked is does the use of the word "action" in subsection (2) convey an intention to limit the ambit of sub-section (2) only to "actions" as that word is used in the Rules of Court, and therefore to exclude motion proceedings of all kinds? One of the so-called presumptions that are often invoked as an aide to interpretation is that a change of wording is taken to convey a change of intention. But that is not always so, or necessarily so. The courts recognize that changes of wording may occur for all sorts of reasons including lax draughtsmanship. To determine the intended legal meaning of the enactment the court is required to consider the word in question in its context and in the context of the enactment as a whole and with due regard to the apparent purpose and object of the enactment.

[17] It is fundamental to the process of interpretation that regard must be had to all words used in the enactment and that they should be harmonized with each other to derive the intended legal meaning and effect. It is to be noted that the word "action" is qualified by the word "such". It is necessary to determine what meaning is to be given to that word and what effect was intended thereby. Ordinarily the word "such"

is used to refer back to the thing previously mentioned or referred to or specified. Self evidently, no "action" in this limited and restricted sense has previously been referred to. However, as an 'action" is a "legal proceeding" it would seem not implausible that the reference to "such action" should be taken as a reference back to the "legal proceedings of any nature" mentioned in sub-section (1). It is also significant that in the second line of subsection (2) the phrase "such proceedings" is used. This is consistent with the wording of sub-section (1) and is anachronistic if the real intention of using the word "action" at the commencement of sub-section (2) was to limit its ambit to actions only.

[18] Given the policy consideration that are revealed by this enactment as a whole which are to prevent councils from being confronted with court proceedings without first having a reasonable and adequate opportunity to consider a possible claim and to deal with it appropriately in the public interest, it is difficult to see any cogent reason why the provisions of sub-section (2) should not apply to all legal proceedings and should be limited to "actions" in the narrow procedural sense of that term. After all, motion proceedings can frequently be as draining of the time and resources of a council and its management as an action.

[19] The Applicant as earlier stated in this judgment sought to invoke the decision of Nicholas J (as he then was) in *Prinsloo vs Johannesburg City Council (supra)* to support their arguments. That case was concerned to interpret a similar provision in Section 172 of the Local Government Ordinance in the Transvaal. After referring to and analyzing a number of authorities the learned Judge held that the word "action"

as used in the Transvaal Ordinance was **"not so plain and unambiguous that it is not legitimate to have regard to the starling consequences of, and the real possibility of great hardship and injustice which result from holding that 'action" as used in Section 172 includes proceedings for interlocutory relief.** The learned Judge also reaffirmed the observation of Innes JA in *Benning vs Union Government (supra)* that **"conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law should be strictly construed and not extended beyond the case to which they expressly apply".**

[20] In this regard I am in total agreement with the 1st Respondent's answer to this that the proposition of law for which the *Prinsloo* case is authority is confined to the wording of Section 172 of the Transvaal Ordinance which is substantially different from the wording of the enactment before this court, and cannot be separated from that wording. It certainly cannot be extended to wording that is substantially and radically different from Section 172. There are a number of differences in wording, the most significant of which (a) that the Transvaal section nowhere uses terminology of such clearly wide and all embracing import as **"no legal proceedings of any nature"** (b) that Section 172 of the Transvaal Ordinance has no sub-section for special leave corresponding to subsection (3) of the Swaziland enactment whereby the court has a discretion to enable to a would be claimant to escape the otherwise possibly harsh provisions of sub-section (2). In this regard I am in full agreement with Counsel for the 1st Respondent that the principle of strictly construing conditions that tend to have the effect of clogging the ordinary rights of an aggrieved person to seek assistance of a court of law does not give a court a free

licence to depart from the legal meaning expressed. In an enactment and that the principle articulated by Holmes JA (as he then was) in the *Mamayisa* case is correct and applicable in the present case.

[21] Counsel for the Applicant sought to bolster her submission that applications for interim relief were excluded from the scope of sub-section (2) by giving the example of a person suddenly being confronted, by a municipal bulldozer at her house wanting to knock it down. It was argued that in such circumstances it would not be expected of the threatened victim to wait for 30 days. It appears to me and in this regard I am in agreement with the 1st Respondent's answer to this that this example and the argument developed from it is met by saying that could well be precisely a situation where a court could be prevailed upon to give special leave, and even to do so as a matter of urgency. But it would always depend upon all the facts and circumstances and Hull CJ correctly pointed out in the *Ray Sibandze* case, urgency and special leave are different concepts, although closely related. So although a court would presumably be sympathetically disposed to come to the assistance of such a person, it would be obliged to have proper regard to all the circumstances, it is difficult to imagine that if such a claimant were to properly address the need for special leave and set out the facts that favour such leave, it would be granted. In the present case the Applicant chose not to seek to advance any facts that would constitute **"special circumstances"** as required by paragraph (b) or to show that the 1st Respondent would **"in no way be prejudiced by reason of the delay in giving the required notice".**

[22] In the result, in the circumstances I find that the peremptory requirements of Section 116 have not been complied with in that no basis has been laid for the granting of special leave and therefore the points of law are upheld with costs to include costs of Senior Counsel in terms of the Rules of Court.

S.B. MAPHALALA

JUDGE