

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4096/2007

THE MANZINI CITY COUNCIL

Applicant

And

MAGISTRATE PHILISIWE D. DLAMINI
THE CLERK OF COURT

1st Respondent

MANZINI MAGISTRATE COURT

2nd Respondent

FAST BUILD HARDWARE

3rd Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. M. THWALA

For the Respondents

MR. S. MAGONGO

JUDGMENT

2nd May 2008

[1] Serving before court is an application on Notice of Motion for an order in the following terms:

1. An order reviewing, correcting and/or setting aside the order issued by 1st Respondent on the 24th September 2007 under Manzini Magistrate's Court, Civil Case No. 1848/2007, wherein an order directing the 2nd Respondent to remove a movable container parked and positioned upon Plot 60, Manzini Town centre in contravention of the Building Act, 1968 was refused in the following manner:
 - 1.1. Finding that the 1st Respondent misdirected herself in dismissing the application;
 - 1.2. Finding that the 1st Respondent misdirected herself in holding that the deponent

of Applicant's Founding Affidavit under the said Magistrate's Court Civil Case No. 1848/2007 had not established his *locus standi* to move the application on behalf of Applicant;

1.3 Finding that the 1st Respondent misdirected herself in holding that the relief sought was in the nature of an order for specific performance.

1.4 Finding that 1st respondent misdirected herself in holding that a Magistrate has no power, at law, to interpret statutes;

2. An order for costs against Respondents in the event that the matter is opposed.

3. Further and/or alternative relief.

[2] The Founding affidavit of the Acting Chief Executive Officer Ellinah Wamukoya is filed in support thereto. A number of pertinent annexures are attached. The Respondent opposes the granting of this application and has filed an answering affidavit of one Bhagubhal Shabbir who is a Director of the Respondent. In the said affidavit certain points *in limine* are raised as follows:

4. *In limine*

4.1 The deponent has not established his *locus standi* to move this application on behalf of the Applicant. The fact that the facts are within his knowledge and belief does not entitle him to move the application on behalf of a legal entity, the Applicant.

4.1.1 The deponent has not even attempted to aver that he is duly authorized to make and depose the affidavit on behalf of the Applicant.

4.2 The nature of application brought by the Applicant is meant to compel the Respondent to remove a container which by its very nature is an application for specific performance. In the premises, the above Honourable Court has no jurisdiction to entertain hear and determine this application as envisaged by Section 29 (d) of the Magistrate's Courts Act No. 66 of 1938.

4.3 The nature of this application hinges on the interpretation of Section 5 (3) of Building Act No. 34 of 1968 which provides as follows:

"Subject to subsection 7, no temporary building shall be constructed in any place without a permit from the local authority".

[3] The arguments in paragraph 4.1 and 4.2 were not pursued when the matter came

for argument on the 15th February 2008, the court heard arguments regarding the third ground in paragraph 4.3 *supra*.

[4] It is contended for the Respondent in this regard that the nature of this application hinges on the interpretation of Section 5 (3) of the Building Act No. 34 of 1968 which provides as follows: **“Subject to subsection 7, no temporary building shall be constructed in any place without a permit from the local authority”**.

[5] The gravamen of the argument for the Applicant is that the basis of the review is **gross irregularity**. *In casu*, the presiding officer misdirected herself through a mistake of law such that she failed to direct herself to the issues before her with the result that an injustice was occasioned to the Applicant.

[6] The Respondent on the other hand argues that the Applicant has failed to show the irregularity in as much as Applicant has not set out the nature of the irregularity. The Applicant’s grounds for review are not at all grounds for review but qualify for an appeal only. In this regard the court was referred to the textbook by *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 932. The court was also referred to the landmark judgment in South Africa that of *Johannesburg Consolidated Investment Co. vs Johannesburg Town Council 1903 T.S. 111 at 114* where it was held as follows:

“In its first and most usual signification, it denotes the process by which, apart from appeal, the proceedings of inferior court of justice, both civil and criminal are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings”.

[7] The Applicant on the other hand contends that this court is entitled to correct the presiding officer in order to assist her to appreciate the power conferred upon her by the Building Act of 1968. Secondly, if not corrected, the Applicant stands to be prejudiced because it would mean that Applicant cannot approach the Magistrate court for the enforcement of a provision not only of the Building Act, 1968 but other statutory enactments that vests powers of enforcements upon the municipality such as the Public Health Act 1969, Urban Government Act of 1969, Rating Act of 1995, all of which are

enforceable through the subordinate courts.

[8] In my assessment of the arguments of the parties I am inclined to agree with the arguments advanced for the Applicant. I find that the point of law *in limine* by the Respondent has no application in the present case. The statute that was relied upon by the Applicant before the court *a quo* vests enforcements authority upon the very Magistrate who mistakenly held that she has no authority. (see Interpretation of Building Act 1968 in Section 2).

[9] In the result, for the afore-going reasons I find that the point of law *in limine* has no merit and is dismissed. I rule further that costs to be costs on the merits of the case and the matter proceeds to the merits of this case.

S.B. MAPHALALA

JUDGE