IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 9120/2015**

In the matter between:

OZAPHI MNISI **1st Applicant**

LOMAKHISIMUSI MNISI **2nd Applicant**

PHUMAPHI MNISI **3rd Applicant**

and

MORRIES DLAMINI **1st Respondent**

MAKETANE NDWANDWA **2nd Respondent**

SANDILE MAZIYA **3rd Respondent**

THE MINISTRY OF HOUSING AND URBAN DEVELOPMENT **4th Respondent**

ATTORNEY GENERAL **5th Respondent**

Neutral citation: *Ozaphi Mnisi and 2 Others Vs Marries Dlamini (9120/2015) [2015] SZHC 185 (23rd September, 2020).*

Coram: Maphanga J

Date heard: 08/12/2015; 05/02/2016 and 07/12/2018.

Date delivered: 23rd September, 2020

Summary: *Civil Law- Spoliation Proceedings-Applicants occupants of communal land administered as SwaziNation Land under traditional*

communal tenure- Peculiar circumstances as pertains tenure ansmg on account of the land in question falling within a *portion of* a *Farm held as Freehold Title Land-*

Dual Tenure System explained- Land undergoing conversion and reversion in use and tenure from SNL to Freehold Title Land upon Royal Grant of lease to the Government of Swaziland on a *portion subdivided and earmarked for urban development- Farm 658 subdivided and* a *portion thereof designated as Lease No,1 of Farm 658 declared as* a *Controlled area in terms of the Building Act by the Minister of Housing and Urban Development- Land under the leasehold identified for purposes of establishing the eBuhleni Urban Area.*

Civil Law at Pcocedure: Applicant's dispossessed of land falling within land under the Leasehold - Ministry commissioning further subdivision and design of a *scheme for the proclamation and establishing of* a *Proposed eBuhleni Town area- common cause that Ministry having proclaimed the area under leasehold as* a *Controlled Area in terms of the Buildings Area by way of Legal Notice duly published in the Government Gazette and pursuant thereto certain office bearers purportedly appointed into the inaugural governing of the eBuhleni Local Authority under further Legal Notice No.60 of 2013 ostensibly in terms of section 2 of the Building Act of 1968- Dispute over the contentious property arising as* a *result of certain portions of the land occupied by the Applicants allocated to* a *third party by the Local Authority for purposes of establishing* a *waste recycling lot- Respondents claiming acquisitive rights over the land in question*

Spoliation- Requirements of the common law remedy of 'mandament van spolie' discussed- Applicant only required to prove peaceful and undisturbed occupation of the property or thing of which disposed and an act of eviction therefrom or dispossession at the hands of the respondent- onus on the respondent to establish the standard defences against such remedial action - Common cause that the applicants and their family's possession derived lawfully through the kukhonta system under Swazi Law and Custom through the Traditional Authorities of the eBuhleni Royal Kraal-

Spoliation - Respondents invoking provisions of the Buildings Act and various Legal Notices issued by the responsible Minister as basis for the legal acquisition of the land taken from the Applicants and declaration of the land in question as a *controlled area- Issue of legality and efficacy of the statutory defences raised arising-*

***Held** the Urban Government Act the relevant and applicable statutory and regulatory framework for the declaration and proclamation of an area to be* a *designated territory for the establishment of* a *local authority and the*

institutional framework for urban government- Urban Government Act contrasted with the Building Act whose scheme is *only intended for the regulation and control of land development and the built environment in the Kingdom-*

Held *Buiding Act not the appropriate statutory framework for the acqusition and designation of property for urban development purposes hence reliance thereon misconceived*

Held further that the Applicants' claim for the remedy of the mandament satisfy the requirements for spoliation it being common cause that their antecedent occupation of the portion of the land in contention met the requirement of peaceful and undisturbed possession *and it being further common ground that he respondents have displaced the Applicants in favour of* a *third party (the 1st Respondent) - Consequently Application granted with* costs.

MAPHANGAJ

[1] The Mnisi's (the Applicants) have brought this application in terms of which they seek injunctive relief in the form of certain urgent interdicts restraining the first three respondents from entering and carrying out construction works on a disputed parcel of land over which the applicants lay claim. They also seek restitutory interdict on the basis of which they move that the respondents be ordered to remove fencing structures and material brought onto the property in question as requiring them to rehabilitate of the land by covering up certain trenches excavated thereon by the first respondent.

[2] The land in contention is situated in an area called *eBuhleni* in the north of the country. It is common cause that the place in question is within the boundaries of an area falling within a recently established Buhleni local authority. The circumstances pertaining to the proclamation of the area under the local authority and by extension, how the property in dispute is affected thereby, are germane to these

proceedings. I therefore intend to revisit these aspects in the course of this judgment.

Background

[3] A sketch of the underlying background facts would give a much needed perspective to the matter and the critical issues to be considered. As their respective last names suggest, the applicants are members of a Mnisi family and denizens of the eBuhleni area. The 1st and 2nd Applicants are siblings, and the third is the s1 t Applicant's sister-in-law.

It is common ground that at all material times prior to the events leading to the present proceedings . they have been residents of *eBuhleni* - a hamlet situated at *eSigcineni* place in the north region of the country. From the gleaned facts this is an area located in what is termed Swazi Nation Land although the appropriate technical designation of the legal tenure of the area shall bear closer examination in this matter. I shall return to this feature in the context of considering the question of the land tenure and its relevance to the present proceedings.

[4) That said, it is also important to mention that the original character of the general area of *eBuhleni* is largely farmland with the community leading an agricultural and pastoral life; in a word carrying on subsistence farming activities. 11 emerges also that the applicant's holding on the land is by virtue of the property being an allotment of land to the Mnisi family under the authority and *eagis* of the eBuhleni Royal Kraal - the land being held or occupied as communal traditional land through the *khonta* system. From the emerging facts I must observe that over the years the character of the specific site of the dispute of the land originally held by the Mnisis has been that of a trading post which has undergone some transformation and development into a commercial hub of the eBuhleni town. It is also

evident from the material before us that on the land occupied by the

applicants in its original fullest extent, the Mnisi's erected certain buildings from which they either carried on certain trading business themselves or leased the said buildings to other persons who conduct trading activities in the area. It is also common ground that the general area itself has recently enjoyed a boost in commercial industry and development and as a result is now a hive of commercial activities with retail and hardware shops thriving.

[5] To ground the application, the applicants rely on a founding affidavit deposed to by the first applicant, Mr Ozaphi Mnisi. In it he alleges that during November 2015, the 2nd Respondent, one Maketane Ndwandwe, approached him with a proposition for access and use of a certain vacant portion of the land occupied by the Applicants for the purpose of establishing a refuse collection and recycling site to be operated by a third party. It is common cause that the 2nd Respondent is a member of the eBuhleni Local Authority. There was a lag as according to the 1st Applicant he told the said Ndwandwe that he (the applicant) needed to consult the family to consider the proposition. However in December 2016 the s1t Applicant says that he was alerted by a tenant that there were persons on the adjacent vacant lot who were digging trenches and erecting a fence there. This became the alleged wrong grounding the launch of this application. A moment to outline the timeline and progression of the proceedings.

THIS APPLICATION

[6] The applicants initially launched the present application in December 2015 seeking its enrolment as an urgent motion and dispensation from the rigor of the rules and relief in the form of a *mandament van spo/ie* to the following effect:

5.1 A mandatory interdict directing the respondents to remove certain fencing and structures constructed on a

certain piece of land claimed by the applicants and to fill up certain excavations and trenches on the said land with immediate effect; and

5.2 An order restraining the said respondents and or their agents from erecting any structures, fencing and assuming ownership over the land in dispute.

[7] The applicant initially brought the application against the first to third respondents in its original form. He asserts that prior to the activities that have given rise to the application he and the other applicants were in peaceful and undisturbed possession.

[8] The application relates to a dispute over land which has pitted the applicants against the Ministry of Housing and Urban Development (the 4th Respondent) on the one hand and on the other the persons named and designated in the Notice of Motion as the first, second and 3rd Respondent. As will emerge these individuals have in the evolution of the proceedings been associated with the 4th respondent in regard to their actions and the activities complained of. The essence of the complaint being that the applicants seek relief against what it characterises as conduct constituting spoliation by the respondents.

[9] I have already alluded to the background common cause facts in this matter in my introductory remarks. These are the key details. The applicants are all members of the Mnisi family ('the Mnisis or 'Applicants'). They are siblings and assert claims as intestate beneficiaries under customary succession law over the estate of their deceased father the late one Josiah Fanyana Mnisi. It is also not in dispute that the Mnisis are and have at all times material to this dispute been residents of the eBuhleni area - a hamlet that has now been developed into a town area situated in the northern region of the country. Until recent developments which form the pith of this dispute,

this area has been settled, administered and fell under the control of the eBuhleni Royal Kraal (*Umphakatsi)* as part and parcel of traditional tenure land or Swazi Nation Land (SNL). SNL refers to land ordinarily under the jurisdiction of the traditional authorities as communal or customary tenure land distinct from freehold title land. I shall return to this feature of the subject matter in the context of the pertinent land tenure systems and the legal implications as pertains this matter as relates to the present proceedings and the issues germane to the dispute.

[1OJ It emerges that the applicants assert their holding by virtue of the land having been allotted to the Mnisi family by the Buhleni traditional authorities. That is common ground. Also not in dispute is that the Mnisis have established certain structures or buildings on the site from which either themselves or their tenants, have carried on trade or leased these structures to persons who conduct retail trading activities in the area. It is further common cause that during the early part of 2012 the Government of Swaziland as it was then (now eSwatini) published a legal notice **(Legal Notice No. 14 of 2012** duly published on the 2nd March 2012) proclaiming the eBuhleni area a 'controlled area' ostensibly as a part of a spatial project for the establishment of an urban development. The designated area in terms of the notice was to encompass a surveyed area comprising some 89.1252 hectares over Farm No.658 (referred in the instruments as a leasehold (Lease No. 1). Accompanying the notice was a survey diagram issued by the Surveyor General - survey diagram SG No. 57/201O - depicting the prospective urban development site. It is further common cause that in due course and pursuant to these plans the government through the Ministry of Housing and Urban Development issued further notices intended for the establishment and appointment of a local authority and its officers respectively with a view of putting in place a Town Board and create the institutional framework for a municipal authority in the proclaimed area. The circumstances of this development are germane

to this application. I deal with the legal intricacies pertaining to this initiative in the context of this application in due course.

[11] In the applicants. founding affidavit deposed to by the first Applicant Ozaphi Mnisi, it is alleged that during November 2015, the 2nd Respondent Maketane Ndwandwe approached the first applicant seeking permission to use a certain portion of the land occupied by the applicants for purposes of establishing a waste disposal and recycling facility to be operated by a third party. It is common cause that the 2nd Respondent at the time was a member of the then newly appointed committee of the Ebuhleni Local Authority. The first applicant was not in a position to respond to the request as he felt it necessary to consult and seek the approval of the family on the matter. There was a lag of about a year until onset of the events giving rise to this application; being that in December 2016 the first respondent entered the disputed patch of land and started certain construction works on a portion of the disputed property initially involving the erection of a fence to secure the premises. Upon further investigating the deponent states that he learned that the 1st Respondent and his workmen had entered the premises ostensibly upon having been allocated the land by the 3rd Respondent one Sandile Maziya. It is also common cause that the latter was ostensibly a member of the local authority claiming to act on a mandate of the local authority which claimed control over the piece of land in question.

[12] It further emerged, and this is common cause, that the first respondent was acting on the strength of the allocation of the said premises ostensible authority of the Ebuhleni Town Board represented by the 2nd and 3rd respondents. Upon enquiry the Applicant's were told by the 3rd Respondent that the plot of land belonged to the Ebuhleni Town Board which had allocated it to the first respondent upon granting it rights to use the disputed land for purposes of establishing a waste recycling undertaking. It is this alleged appropriation of the disputed property that the applicants allege constitutes an unlawful intrusion or invasion by

the respondents. With this backdrop it appears that Central to this dispute and the issues is the interposition and status of an entity-the eBuhleni Local Authority or Town Board. I shall revert to this aspect further in this judgment.

[13] When the application was initially enrolled on the 8th December 2015 it came *ex parte* for interim orders against the first to third respondents and was placed before His Lordship Justice T. Dlamini whereupon the court issued a rule nisi as pertains the relief sought returnable on the 26th February 2016. Thereafter the matter was postponed on a number of occasions.

[14] On the 4th of February 2016, the Ministry of Housing and Urban Development represented by the Principal Secretary (the 4th Respondent presently) filed an application seeking to intervene and be joined as a necessary party in the proceedings. The upshot of the application was that the 4th Respondent had a direct and substantial interest in the proceedings on account of the fact *inter alia* that the property in dispute is situated in an area that has been declared a 'controlled area' the effect whereof is that it fell under the 'custody' of the Ministry which sought to assert rights over it and further that the eBuhleni 'controlled area' had been demarcated into plots for residential, commercial and industrial purposes subject to the Surveyor General issuing a sub divisional plan showing the scheme. The application for joinder was not opposed and in the event 4th Respondent was granted the necessary leave to enter the fray and file its answering papers which it did on the 15th February 2016. The Ministry and Attorney General as the principal attorney became 4th and 5th Respondents respectively.

[15] On the 26th February the matter was postponed to the 11th March 2016 and was allocated the 8th of April 2016 as a date for hearing of the application upon the filing of a full set of affidavits.

For some obscure reason the matter again lay fallow until the y1h of December 2018 when it served before me.

THE RESPONDENTS CASE

[16] This is the crux of the respondents' case as foreshadowed in Mr. Mamba's affidavit deposed in the Ministry's application to intervene as a party.The Respondents contest the applicants' rights over the disputed plot of land and as indicated above their primary contention is that regardless of what rights the respondents enjoyed or the nature and effect thereof, such rights were exercised over the said land under the erstwhile tenure prior to the proclamation of the eBuhleni site to be a 'controlled area' in terms of the Buildings Act. They contend further that upon the declaration of the area as an urban development all land falling within the municipal boundary ceased to be communal tenure land and its control became vested in the local authority subject to the administrative jurisdiction of the local authority. A crucial element of the respondents' case is that by virtue of the cession under leasehold of the land to the authority and control of the Ministry, the applicants lost all pre-existing rights over any residual portions of land they previously occupied beyond the existing buildings constructed on the site; alter any rights they previously enjoyed or accrued over these aspects of the property in dispute to the extent that ownership of such land now vested to the local authority to develop and to put such land to municipal use. Consequently, it is contended, that the 4th respondent has by virtue of the legal notices proclaiming the area as a controlled area as read with the notices declaring the municipality and establishing its governing institutions, acquired rights over the entire area falling within the boundaries of the municipal area entitling it to appropriate the tenement of previous occupiers of the land within the municipal boundaries of the acquired properties.

[17] It is important to outline the legal events and foundational facts on which the respondents' case against the application is grounded; these

facts derive from an answering affidavit deposed to by the Principal Secretary of the Ministry, the 4th Respondent, resisting the sought injunction. Here I seek to highlight the averments it to place the 4th respondents key contentions; which are mainly points of law; into sharp relief. As stated earlier it is common cause that the area under contention as indeed the entire eBuhleni locality is situated within Farm 658 the full extent of which is situated in the Hhohho district in the north. The said farm 658 is held by His Majesty the lngwenyama. The fullest extent of the farm does not appear in the papers nor has it been disclosed. That however is of no moment in these proceedings. Suffice to say that it is common cause that a certain portion of the farm was surveyed, earmarked and demarcated as a preliminary step to the conception of the eBuhleni development. This area became a sub division of the said Farm 658 in respect of which in July 2008 Government of Eswatini was granted a lease under His Majesty's consent for the purpose of establishing Ebuhleni local authority and urban development.

[18] The leasehold (Lease No.1 of 2010) covers an area identified under the Surveyor General's diagram No. S.G. No. S?/2010 measuring 89.1252 hectares in extent. These facts are set out in the 4th Respondent's Answering Affidavit deposed to by the Principal Secretary in his representative capacity on behalf of the Ministry and ostensibly by virtue of his position as Chairman of the Buhleni Local Authority, opposing the application. In it he further states that in order to advance the process of establishing the eBuhleni local authority, the Minister of Housing and Urban Development ('the Minister'') by Legal Notice No. 14 of 2012 published on the 2nd March 2012 declared the area (Buhleni Area) a controlled area. On its face the Notice was issued in terms section 4 of the Building Act 34 of 1968. I shall return to the legal significance of the notice momentarily.

On the ih April 2013 and 16th August 2013 the Minister caused to be issued further legal notices Nos. 60 and 116 of 2013 in terms of which

she appointed a compliment of members of the local authority under the title ***"THE APPOINTMENT OF A LOCAL AUTHORITY FOR A CONTROLLED AREA (BUHLENI) NOTICES,*** ostensibly under section 2 of the Building Act".

[19] Now the principal basis on which the 4th Respondent opposes this application is premised on a number of contentions. Foremost the Principal Secretary contends that on account of the area in question falling within the declared controlled area, those properties belong to the Buhleni Town Board which exercises administrative control over the said property within the boundaries of the area so proclaimed and the applicants have no rights of the land so acquired. This appears more fully in paragraphs 4.3 and 4.4 of the Answering affidavit where it is stated;

> ***"4.3 May I state further that this is a business area. A person who had a structure in the area before it was declared a controlled area was allocated the land where the structure was built anything outside that structure does not belong to him but it forms part of the control/eld area.***
>
> ***4.4 May I state further that no person has a claim over that area is administered by the local authority which was appointed through the Legal Notice No. 60 of 2013 and the 2nd Respondent is a member of that Local Authority."***

[20] In reference to the said Notice the deponent adverts to an annexure; a copy of the said Legal Notice No. 60. I must state however that without any supporting evidence or documents, the assertions as to the designation of the property in dispute by the authorities as a 'business area' appears a mere bald statement. Furthermore I am unsure as to the significance to be attached to the designation 'business' area without any legal or functional distinction to be made between areas so

designated from the rest of the land falling within the boundaries of the area allegedly proclaimed by the 4th Respondent as a 'controlled area'.

[21] In the Principal Secretary's affidavit reference is also made to a request allegedly made by the 1st Respondent, the said Morris Dlamini, to the local authority to have a temporary site where he could recycle waste and further to an approval to this request granted by the local authority. To this end again a copy of certain minutes dated 2?1h August 2013 are attached as an annexure recording the approval of the 'request' by the local authority.

[22] The Principal Secretary further discloses that the 2nd Respondent, the said Simon Ndwandwe, was instructed by the local authority to inform the residents of the properties in the vicinity of the approved waste recycling site granted to the 1s t Respondent; the 1s t Applicant being one of the interested persons to be informed. He thus refutes that the 2nd Respondent would have sought permission from the 1st Applicant or her family. In sum the position conveyed in the main opposing affidavit tendered by the 4th Respondent is that it acknowledges the appropriation of the disputed patch of land and takes full responsibility for and thus indemnifies the first 3 respondents for the conduct complained of.

An anomaly in Applicants Claim

[23] The first practical difficulty presented by the Applicants' application arises from a number of inherent anomalies in it. The first of these concerns the subject matter of the application itself. The applicants seek to vindicate certain rights over a certain piece of land which on the papers has not been properly identified in the founding affidavit i.e., in the sense of a specified unit of land. Secondly, owing to the unique informal tenure as pertains real rights over unsurveyed, unregistered and undivided communal land the rights sought to be asserted and protected by the applicants cannot be defined in the conventional way.

[24] These issues are not unique to this application. Given the historic dual land tenure system in the Kingdom that entails a distinction between Swazi Nation Land on the one hand, Crown and Free Hold Title (or Title Deed Land) on the other, it is not uncommon that applications for various forms of relief come before this court over claims for rights on land falling under the jurisdiction of the traditional authorities. This matter presents an unique set of circumstances in so far as *de jure* the land in question is situate on freehold title farmland, it has for some time been settled and administered as communal tenure land under the control of the traditional authorities at eBuhleni - thus undergoing some form of *de facto* conversion in tenure. I revert to this feature of the matter later in this judgment.

(25] To facilitate the proper consideration of the matter in view of these circumstances with the concurrence of the parties it became necessary for this court in exercise of its discretion under Rule 6 (17) to address the paucity in the affidavits.

Referral of Certain aspects of the application to oral evidence and input by Surveyor General

(26] Due to the paucity of information as pertains particulars of the property in dispute and the fact that the property involved and unregistered/unsurveyed piece of land, the court with the concurrence of the parties ordered that the Surveyor General undertake a survey of the parameters of the land in dispute with a view to the determination of its geophysical co-ordinates and location of the parcel of land in contention. The matter was postponed to enable the completion of the exercise. I shall deal with the circumstances and outcome of the survey further in the judgment.

[27] Pursuant to the order the Surveyor General completed the exercise and filed his report with various diagrams of a general survey and scheme of the township and this was submitted and filed on the 4th March 2019. The details of the survey are canvassed in the latter part of the judgment in the analysis of the evidence (both documentary and oral) led in the matter. By concurrence of the parties I further ordered that oral evidence be led to deal with and throw some light on certain aspects, namely;

27.1 to clarify and present the Surveyor General's Report and to explain annexed diagrams in the context of the matter; and

27.2 enabling the parties to lead evidence as pertains to the circumstances and events leading to the dispute to supplement the evidence on affidavit in light of the illustrative survey diagrams.

SUMMARY OF SURVEY REPORT AND ORAL EVIDENCE.

[28] The first witness called was Mr Sidney Simelane, the Surveyor General in the office of the Surveyor General. Its main mandate is to conduct surveys and generate survey diagrams of all public property held by the state and are often mandated to carry out general surveys under specific instructions and for land development purposes. As indicated the Surveyor Generals testimony was ordered *per amicus curiae* by this court to assist in bringing light into the physical features of the land in dispute with the aid of a technical survey to identify the contentious areas from a factual point of view. Thus the surveyor generals testament was largely a presentation of his derivative report of that survey and to place before court the attendant diagrams depicting the area in question as well as locate the units of land affected.

[29] Firstly the Surveyor General narrated the background circumstances and facts pertaining to the origins of the eBuhleni township development. Much of these are a reiteration of common cause facts already alluded to in this judgment. According to Mr Simelane the Surveyor General's office was commissioned to undertake a survey and partitioning of a certain property derived from Farm 658 situate in the Hhohho district; land earmarked and identified by the relevant authorities for development of a proposed urban area - the eBuhleni Town area. The land in question and the greater extent of the farm is held by the lngwenyama in Trust for the Swazi Nation (eMaSwati) and had over the years been settled and administered as Swazi Nation Land. Mr Simelane stated that the Ministry had sought and procured the requisite consent from the lngwenyama for the purpose and this consent became the basis for the survey and subsequent subdivision of the identified area set aside for the formal procedures for the Town development. The partitioned portioned so identified would then be placed at the disposal of the Ministry under a lease by His Majesty.

[30] The Surveyor General produced the requisite survey of the subdivision and generated a subdivision diagram. It is again common cause that this diagram has been identified as S.G. Diagram No.S?/2010. It formed basis for the formal grant under Lease No. 1 over Farm 658 of the subdivision to the Government of eSwatini held under the Ministry. Pursuant to the acquisition of the land by the Government and its functional hand over to the Ministry, the Surveyor General told the court that his office received instructions from the Ministry to prepare a survey of a general layout or scheme in development for a plan of the Town area. That layout was to set out the schematic land use spatial arrangements including designation of the elements of the town into *inter alia* commercial, industrial and residential areas for the proposed town. That concluded the exercise of the Survey General in facilitating the establishment of the town area. It was for the Ministry of Housing and Urban Development to carry out further procedures for the legal proclamation and designation of the various elements in the township

scheme as well as the assignment or allocation of the lots or everts in the town for identified use.

The Interim Order

(31] The main thrust of Mr Simelane's testimony was that with this background on hand his office responded to the order of this court to attend to the survey as instructed and in the process his officers met with the affected parties and the officers of the eBuhleni local authority who assisted them to identify the contested in relation to the existing town spatial scheme. The parties assisted in identifying the pegs as well as the extent and location of the relative units of land in dispute. It is important to highlight that under cross examination by the applicant's attorney Ms Simelane the Suveyor General was firm in his evidence that his office had neither any hand nor information as to the allocation to various property holders of any of the lots in the commercial area in dispute and that they relied entirely on the parties in the identification according to the claims and holdings of the various properties concerned. The Surveyor General also made plain that the supply of the relative data to inform the layout as well as the allocation of the portions surveyed as urban lots fell under the sole jurisdiction of the Ministry and his office had no hand in the process.

Survey Diagrams

[32] I now come to the features of the survey diagrams produced for purposes of this matter. It was identified by Mr Simelane as survey DIAGRAM 1 and he described this as a derivative illustrative diagram drawn from the source spatial layout survey (DIAGRAM 2) but highlighted for purposes of this application so as to graphically magnify the affected areas and the property in contention. Diagram 2 depicts the general layout or scheme of the Town Area. There is a linear road that runs through the town forming the central axis. It is the public road R/658 which runs from Madlangempisi to Msahweni (where the said

R658 links to R31 to Matsamo). The said R658 dissects the town through the central or commercial business heart of the town from east to west. Beyond this central commercial hub the layout of the town roughly comprises various lots constituting the bulk of residential lots to the north of the roadway and further residential lots on the margins of the business district on the south flank. The rest of the lots that are larger in size and extent comprise of public amenities set aside for mixed public use including recreational, as well as industrial facilities.

[33] The surveyor general presented diagram 1 as an exploded view on a section of the larger area of the town development survey plan shown in diagram 2 to highlight in much keener detail the location of the disputed property. During the evidence it emerged as common cause that the lots appearing in Diagrams 1 and 2 demarcated in yellow colour appearing as Lots 358XB and 359XB are developed lots presently used and occupied by the applicant where they operate retail or commercial premises.

[34] The Surveyor General identified these lots as the properties pointed out to him on instruction by the Ministry to be surveyed and set aside as the Mnisi premises - thus 'allocated' to the applicants. As indicated they are marked in distinct yellow in both diagrams. However during cross examination the Surveyor General conceded that it was made know to him upon the identification of the lots and relative pegs that the area claimed by the Applicants ranged beyond the lots demarcated in yellow to include another contiguous area comprising a cluster of survey lots 300XB to 304XB.

[35] As regards the question of the method and or process of allocation of the lots, it became evident upon cross examination by the applicants attorney that the Survey General was not privy to the information and made plain that this was a matter falling outside his mandate or the jurisdictional purview of his office; that having carried out the survey and sub divisional plan of the town area as instructed by the Ministry it

became the exclusive business of the Ministry how the lots were to be designated or allocated.

[36] I must indicate that he court found the Surveyor General's input and assistance most invaluable and insightful and for that reason I record the Courts appreciation of that offices very professional and diligent technical service to the court in illuminating the otherwise obscure factual issues central to this dispute. The diagrams are a most instructive reference material. With the benefit of the Surveyor Generals evidence Ms Simelane on behalf of the Applicants, sought to lead oral evidence, if to supplement the evidence on affidavit deposed to by Messrs Ozaphi Mnisi and Malamlela Nxumalo in the founding and confirmatory affidavits respectively in relation to the new evidence as provided in the Survey Report and diagrams (contextual). The respondents acceded to the application and the Court accordingly permitted the leading of Mnisi and Simelane in viva voce evidence.

[37] Mr Malamlela Nxumalo identifies as a small enterprise businessman of the area and is also a resident. He told the court that before the conversion he and the Mnisis (the applicants' family) had *khontaed* in the area then known as *eSigcineni* under the royal kraal and in a process facilitated by the then lndvuna Shekwa Fakudze had been allocated land for his commercial enterprise by the Esigcineni traditional authorities in the same way as the Mnisis. He was thus familiar with the facts and circumstance of the allocation and occupation of the land by the Mnisis prior to the developments that have given rise to this dispute. He told the court that since the declaration of the town and the processes undertaken by the Ministry he was not aware of any survey, pegging and designation of lots of the area nor was he aware of any formal allocation of any land within the eBuhleni general area as part of the development to bring such land within the fold of the eBuhleni town. He did concede that as all the residents he became aware of the proclamation of the area as a

controlled area and the incorporation of his and the Mnisi properties within the area so proclaimed.

[38] His novel and material input however was in reference to diagram 1. Nxumalo identified Lots 358XB and 359XB and also Lots 300-304XB as part of the property previously held by the Applicants' family. He was not aware of any process of acquisition of any land by the eBuhleni Town or the method/criteria! in dividing the lots let alone their allocation to specific persons. Most significantly he pointed out that he was never consulted as a resident nor was he aware of any consultations or engagement of the community and affected parties by the government authorities for such purposes and or settlement of any disputes or differences that might arise in the exercise.

[39] Mr. Mnisi's evidence was largely common cause and consistent with Nxumalo's testimony. Of significance in relation to the in situ identification (contextual) evidence in relation to the areas allegedly claimed by the 4th respondent, he asserted without that the land originally allocated and occupied by the Applicants prior to the proclamation of the controlled area extended from the margins of Lots 358XB and 359XB bounded by the R658 on the northern flank to the cluster of properties appearing more fully and marked in Diagram 2 as Lots 300XB-304XB and further demarcated by semi-surfaced and gravel road to the east proceeding to the further lots bounded by an irregular gravel road to the south. In short an area much larger and beyond the lots 358 and 359 'designated' as the Applicants. This evidence was not controverted by the Respondents either in cross examination or by own countervailing evidence.

[40] All told I think the oral evidence led serves to highlight the fact that other than Lots 358XB and 359XB, the respondents regarded themselves having acquired or appropriated the adjacent property for use by the proposed eBuhleni Town against the previous occupier. There is thus no dispute that the adjacent land allegedly allocated to

the first respondent formed part of the Mnisi holding under SNL and the unfolding events that have given rise to the dispute.

[41] Emerging from the totality of the oral and documentary evidence (on affidavit and by way ·Of the Annexes as diagrams, Legal Notices, the Survey Report and diagrams is the common ground that the appropriation of the land in dispute from the Mnisi's did not follow a formal process of acquisition, allocation or designation in terms of a scheme or subdivision or development. This is underscored without doubt in the 4th Respondent's affidavit (to intervene as a party and answering affidavit) where the Principal Secretary disclosed that the identification of lthe business lots in line with the scheme or the down as laid out in the Surveyor General's DIAGRAM 2 (the Town Layout Plan) had not been carried.

CRUX OF RESPONDENTS CASE

[42] The crux of the Respondents case is this. They contest the applicants' rights over the disputed plot of land; their primary defence is that regardless of what rights the respondents enjoyed or the nature and effect thereof, such rights were exercised over the said land under the erstwhile tenure prior to the proclamation of the eBuhleni site to be a 'controlled area' in terms of the Buildings Act. They contend further that upon the declaration of the area as an urban development all land falling within the municipal boundary ceased to be communal tenure land and its control became vested in the local authority subject to the administrative jurisdiction of the local authority. A crucial element of the respondents' case is that by virtue of the cession under leasehold of the land to the authority and control of the Ministry, the applicants lost all pre-existing rights over any residual portions of land they previously occupied beyond the existing buildings constructed on the site; alter any rights they previously enjoyed or accrued over these aspects of the property in dispute to the extent that ownership of such land now vested to the local

authority to develop and to put such land to municipal use. Consequently, it is contended, that the 4th respondent has by virtue of the legal notices proclaiming the area as a controlled area, as read with the notices declaring the municipality and establishing its governing institutions, acquired rights over the entire area falling within the boundaries of the municipal area entitling it to appropriate the tenement of previous occupiers of the land within the municipal boundaries of the acquired properties.

THE ISSUES

[43] The core issue to be determined in this application is whether the legal basis on which the respondents rely for the legality of the taking over or the property and dispossession of the applicants is supportable in law. Put another way and more specifically, it is whether the various legal instruments comprising the Legal Notices for the declaration of the area under Lease 1 have the alleged legal effect of conferring ownership and control of the land in contention on, the Ministry on the basis of such property being an integral part of the residual (unallocated) area or lots falling under the direct ownership of the eBuhleni local authority regardless of the residents' previous holding or rights prior to the issuing of the said notices.

STATUTORY SCHEME

[44] The principal statute invoked by the respondent to assert its authority and rights is the Buildings Act 34 of 1968. It places much capital on the provisions of sections 2 and 4 of the said Act as basis for the actions it has taken and to justify appropriation of the contested parcel of land in contesting the present application.

[45] The Buildings Act as its moniker suggests has as its primary object the regulation and control of the built environment and to provide safety

and 'fitness of purpose' oversight on all building construction and ancillary activities in designated areas. The so-called "controlled areas".

[46] Section 2 of the Act defines a 'controlled area' as follows:

> ***"controlled* area" *means* a *municipality* or *town within the meaning of the Urban Government Act (No. 8 of 1969)* or *an* area *which the Minister, after holding* a *public enquiry in the* area *concerned has by Notice in the Gazette, declared to be* a *controlled* area".**

Section 4(1) defines the scope of application of the Act in the following terms:

> ***"4(1) This Act applies to a building situated-***
>
> a) ***in a controlled area; or***
>
> b) ***outside a controlled area and used and intended for use in commercial or industrial activities including a factory, hotel or a shop or a building used for public purposes or public entertainment or a building to which the public has access"***

[47] Section 4(2) is the provision which appears and has been cited in the Legal Notice relied on by the 4th Respondent for the declaration of the eBuhleni area as a controlled area. That section repeats in substantially similar terms, the definition of a 'controlled area' carried in the interpretation section of the Act (section 2) by reference to the words:

> ***"4(2) For purposes of subsection 1* a *controlled* area *means an area within the jurisdiction of* a *Town Council* or a *municipality* or *town under the Urban Government Act, No.8 of 1969* or *an* area *which the***

Mini;;;ter after holding a public enquiry in the area concerned has by Notice in the Gazette, declared to be a controlled area".

[48] Finally section 11 of the act merely provides the applications procedure for a building or demolition permit. It does not seem to have any bearing on the issues on hand.

The Law on Declaration or Establishment of *A Local Authority*

[49] The appropriate legal framework for the declaration of a municipality or town over any area in the Kingdom designated for such a purpose is provided for in sections 4 and 11 of the Urban Government Act of 1969. Section 4 of the reads:

"Declaration of municipalities.

4 (1) Subject to the provisions of this section the Minister may by notice in the Gazette:

(a) *declare any area to be a municipality;*

(b) *assign a name to and alter the name of a municipality;*

(c) *define the boundaries of any municipality and alter such boundaries; and*

(d) *declare that any area shall* cease *to be a municipality.*

(2) *The Minister shall not publish a notice under subsection (1) without first:*

(a) *publishing a notification in the Gazette and a newspaper circulating in the area concerned advising the public of the details of the notice he intends to publish and the reasons therefor, and inviting any*

person to submit

any representations he may wish to make to the Minister by a time to be specified in such notification; and

(b) ***considering any representations made in response to the notification published under paragraph (a) and, where a commission has been appointed under subsection (3), the report of that commission.***

(3) ***Where the Minister intends issuing a notice under subsection (1)(c) or more persons selected by him to consider any representations received in response to the notification referred to in subsection 2(a) and to advise the Minister whether or not the intended notice referred to in such notification should be published; and the provisions of the Commissions of Enquiry Act, No. 35 of 1963 shall apply to such enquiry."***

[50] Quite apart from establishing such local authority, the effect of the proclamation of a municipality is to bring the designated area within the jurisdictional fold conferring control and governance of the local authority (be it a municipality, town council or board).

[51] Sections 4 (2) and (3) together with section 111(2) of the Act sets out and prescribes in very clear terms the legal path to be followed by the Minister in declaring a municipal or town area; this includes the procedural process and conditions to be followed or fulfilled. It is the only statutory process for such declarations. This position was conceded by Counsel for the 4th and 5th Respondents in his written submissions in the heads of argument filed where he says:

"4.2 According to the Urban Government Act of 1969 section 4 states that the Minister for Local Administration currently known

as *the Minister for Housing and Urban Development, may by Notice in the Gazette declare any area a municipality"*

Appointment of the Local Authority of *eBuh/eni.*

[52] I now come to the question of the legal status of the Legal Notice No.60 in terms of which is purported the establishment of the institutional framework of the eBuhleni local authority and the appointment of its officers by the 4th Respondent (in the persons of the 2nd and 3rd Respondents as members of the said local authority. The legality of this notice of appointment and its legal effect has a bearing also on the status and legality of the actions taken by the persons acting in the ostensible authority of the eBuhleni Local Authority.

[53] As is apparent from its face, the Notice purports to be made in terms of section 2 of the buildings Act. As stated earlier the said section is no more than an interpretation section. It does neither confers any power nor does it grant authority for the appointment of officers of a local authority. In fact nowhere in the Building Act there exists any provision for such purpose. The reason for that is not difficult to see. The latter is a statute whose purpose is far removed from the legal framework for the declaration of local authorities and the constitution of any local government. That architecture as pointed out exists in the Urban Government Act of 1969.

[54] There are a number of reasons why the legal notices relied on by the Respondents are legally ineffectual as authority to do what they have done. Before pointing the anomalies arising it is important to make one significant distinction in regard to the Notice proclaiming the land described as "Lease 1" a controlled area. It is this: In so far as the said notice seeks to declare the land as such within the meaning and the purpose of the Buildings Act 34 of 1968, no issue arises in that regard this being a permissible and legitimate object of the relevant section in also generally of that statute. However this is distinguishable from the

legal purpose of declaring a town area or local authority of any category. For this reason the respondents contention that the said notice creates the eBuhleni local authority or places the land proclaimed as a controlled area under a duly constituted local authority is a legally unsound and therefore untenable proposition. The notice purporting to establish a local authority although well meant is a nullity in so far as it lacks any valid statutory basis. It is based on an improper statute and thus is not fit for purpose. The purported invocation of the Building Act for this purpose is equally misplaced and of no force or effect.

[55] It was further contended that he said legal notice is the foundation for the assertion of rights over and acquisition by the said local authority of the land falling within the area proclaimed as a controlled area. To this end it is further asserted that the said notice as much vests the ownership of the said land on the local authority as it does the control over such land having converted the said territory from communal land.

The second quiver in the respondents bow is that in any event the leasehold granted to the Government by the sovereign under Royal seal confers ownership and control over all residual properties falling outside developed erven where the previous occupiers have built structures; in a word that ownership over public areas within the area ceded under leasehold belongs to the local authority and is reserved for public use for industrial commercial purposes. To this end much reliance is placed on the Royal Consent Annexed as Annexure AG2.

[56] I think this is another misconceived proposition. It is clear that the document relied on as a pledge for a prospective grant of a leasehold in perpetuity actually in its terms contemplates various procurement procedures including the survey and subdivision of the land proposed for urban development under the prospective lease. That position accords with the oral and documentary evidence placed before this

Court by the Surveyor General. It emerges that after the document

Annexure AG2 was issued and as envisaged therein, the proposed subdivision from the area generally earmarked and partitioned for was eventually carried out in 2010. That was also when the conduct of a general survey and mapping out of the layout of the proposed town was carried out.

[57] The process of sketching out the proposed town scheme is adverted to in the 4th and 5th Respondents heads of argument which merit highlighting here as follows:

> ***"Further Legal Notice No.116/2013 appoints members of a Local Authority of the eBuhleni area. The appointment of a Local Authority signifies that the area has since been designated as a controlled area which is to be declared a town once the Surveyor General has identified and demarcated into plots for industrial purposes. (sic). Such pegs for demarcation are yet to be identified".***

[58] . What can be readily gleaned from the Respondents' own submissions is that the declaration of the demarcated land in question to be a controlled area was but only an initial step towards the town layout, design and development and a precursor to its dedication to be a local authority or town in law.

[59] No evidence has been placed before me of an instrument in the form of a formal lease or registration of such a holding or rights over the property conferring authority and control over the land intended for development into the *eBuhleni* Town. A glaring paradox in the respondents submission that I refer to above is the reference to an appointment of members of a local authority of eBuhleni for the governing body of the envisaged town before it had been formally established or declared in terms of the Urban Government Act. That to me seems to have been an illogical and premature step in the general scheme of things. This is so on account of the want of any evidence

that the Minister responsible has at any point declared a town over the proposed leasehold territory nor established a local authority as envisaged in section 4 of the Urban Government Act - the enabling provisions of the Act.

[60] Turning to the nature of the relief and cause before me, it is significant to note simply that at the heart of the matter is the disputed strip of land giving rise to this application. It is common cause that the applicants have been displaced by the acts of the respondents from this parcel of land. It was identified with the aid of the diagrams that I ordered be produced upon proper survey of the land in question as a unit of previously unsurveyed land and was given lot Numbers **358XB** and **359 XB** in the survey diagram and report submitted by the Surveyor General. As stated earlier there is no real dispute that the applicants family were settled and in occupation of this property albeit under the communal tenure arrangements and thus exercised physical control over the said strip of land. They had a usufruct over the property in question.

[61] The respondents by the acts of the individuals in the person of the 1st to 3rd respondents and ostensibly with the authority of the 4th respondents, invaded and taken over the land in the name of the eBuhlenin local authority. It is not in dispute that there was no due process involving first a proper survey to investigate partition and identify the properties in question nor to adjudicate and receive any claims by the applicants as the affected parties. It seems to me that given that the land intended to be incorporated into the town area was already settled under the traditional communal tenure regime, the proper and fair process to follow upon its re - conversion into freehold title tenure would have been to resettle those persons adversely affected by the acquisition by Government of those properties identified for public use. I am fortified in this view by the protections provided by section 19 of the Constitution of eSwatini to which I make reference earlier in this judgment which ensures that no person may be

evicted or

displaced in his possession of property unless such an act is sanctioned and justifiable by law and due process has been followed.

[62] I do note that there may have been legitimate intentions behind the intentions of the officers concerned to advance the plans for prospective acquisition of the area for urban development by the Ministry and indeed those initial steps in the procurement of the leasehold and the proclamation thereof into a controlled area were probably taken in good faith. However it is clear that the requisite procedures by way of the prescribed legal instruments for the acquisition of the land, the implementation processes for establishment of a town as well as addressing disputes and or claims arising out of the resettlement of the affected community appear not to have been followed in this case.

In view of these shortcomings, it appears that the process seems to have been poorly supported in terms of the necessary redical legal support to have been overlooked.

[63] In all this it is remarkable that the respondents contend that the applicants should be unsuited simply because they have not proven ownership rights over the land in question. It is not in dispute that the holding exercised by the applicants prior to their displacement over the plot concerned was in the form of informal and undocumented or unregistered usufruct over the land in question. It also beyond question that at the commencement of the application this strip of land had not been surveyed to enable its proper identification as a unit of land. However that impediment has been cured. In my understanding the applicants are not asserting ownership of the land in the common law sense of the word. In any event 'ownership' per se is not a prerequisite condition to the relief sought. That relief is expressed in the form of a mandament and restorative redress.

[64] The remedy of restitution or restoration of possession is after all an interim or temporary relief which in the common law is attainable under the *mandament van spolie* pending the determination in due course of the parties' respective rights. That is all that is sought by way of the interdicts that the applicants pray for in these proceedings.

That said, the grand scheme of the eBuhleni project can still be rolled out in compliance with the relevant legislation and the appropriate instruments for the acquisition and appropriation of the land required for the public purpose from the previous rightful occupiers as well as their resettlement. There is scope also for settlement of any claims or disputes in respect of the affected community which can still be undertaken through a mechanism that enable an open process for fuller and fair consultations. I am certain there are precedents in recent memory that should serve as a model for such resettlements from land required for key public projects. It appears to me this may entail the creation of appropriate mechanisms for the identifying any claims over land or disputes concerning the affected residents - thus clearing the way and enabling any authority or interim bodies once put in place to set and implement the urban development plan for the town. All this can be undertaken in the fullness of time.

[65] Contrary to the submissions advanced by the Applicants, I find it unnecessary for the purpose of this application to make any determination as regards the applicability of the Acquisition of Properties Act to which I was referred by Applicants counsel Ms.Simelane. This for the simple reason that the latter act involves the acquisition and settlement or compensation issues between the State and owners of affected properties sought to be acquired. The applicants are not registered owners of the properties in question. There is no question that in law the ownership of the land in question vests by title in the lngwenyama and may only be transferred or ceded by royal deed. In this case this process was initiated in the form of leasehold for public development purposes.

[66] In sum the applicant has brought this application for an interdict in the form of the mandament complaining of an unlawful eviction or displacement from a certain piece of property. The respondents do not deny the eviction but deny that it was unlawful and rely on certain statutory provisions and certain legal notices to justify their actions. The onus of proving the legality of their actions thus shifts onto the respondents.

[67] The correct common law position is that the only basis a respondent may successfully repel and application for *mandament van spolie* is if he establishes the following defences:

a) either that the applicant was not in the alleged peaceful and undisturbed possession or occupation of the property in question; or

b) respondent has not committed spoliation.

[68] The first defence has not been raised in this matter but only the second one. In that regard the learned authors Silberberg and Schoeman give an example of the sort of defences a respondent may advance to include that a respondent's *'act of dispossessing the applicant was in fact not unlawful in that it was justified in terms of some or other statutory enactmen/'*[1] . That is precisely the line of defence adopted by the respondents taken in this case.

[69] That therefore makes this the crisp issue on which this matter turns. I now turn to the common law principles defining the remedy of the spoliation interdict. The applicable prerequisite legal standard for attainement of the mandament remedy are well known and have oft restated by this court in many cases. These have been summarised

1 Silberberg and Schoeman, *The Law of Property"* 2"d Edition, BUTTERWORTH 1983., at page 138.

succinctly by Her Ladyship Mabuza PJ in ***Mefika Matsebu/a v Mandia Ngwenya*** **(4306/10) [2012] SZHC 142** [2] . I am satisfied that the applicants have met the elements and conditions of the mandament *van spolie.* They have shown that at all times prior to their displacement they were in peaceful and undisturbed possession or occupation of the property in dispute - this on account of the fact that it is not in doubt that the property in question has been in the family hands for a long period under customary tenure.

[70] For the reasons I have traversed above the reliance by the respondents on the alleged legal notices and statutory provisions they advance is not only misplaced and misconceived but is also untenable - there having been no compliance with the procedures set out in the Urban Government Act in the declaration and establishment of the local authority by law. They have thus failed to discharge the onus on them to demonstrate the legality (statutory or otherwise) of their actions.

[71] In the circumstances I am of the opinion that the applicants satisfy the conditions for grant of the relief sought and are therefore entitled to the remedy they seek and the confirmation of the orders nisi obtaining subject to a few modifications . I therefore make the following orders:

ORDER:

1. The Respondents and or their agents are hereby ordered and directed to remove the fencing and structures constructed on the property adjacent to Lot 359 XB as depicted in the survey diagram 1 and are further directed to take remedial steps to restore the said property to its antecedent condition and state including filling up the

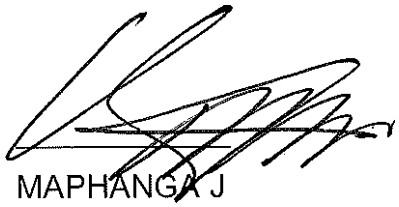
---

2 **See the judgment in *Mefilw Matsebula v Mandia Ngwenya* (unreported) at pages 9-12 paragraphs 23-27 and the leading judicial authorities therein cited..**

trenches that have been dug on the land with immediate effect;

2. The respondents and or their agents are hereby interdicted and restrained from erecting any fence or any other structure and to remove any foreign objects, articles and effects brought onto the said property and from carrying out any further activity on the said land; and

3. The respondents are hereby directed to pay the Applicants' costs of the application on a scale as between party and party.



MAPHANGA J

Appearances:

For Applicant : Ms. R. Simelane
Khumalo Ngcamphalala Attorneys

For Respondents: Mr. V. Manana
Attorney General's Office