IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between: **Case No.1411/2017**

ADRIAAN JACOBUS VAN WYK 1st Applicant

THE GABLES (PTY) LTD 2nd Applicant

And

EZULWINI MUNICIPALITY Respondent

In re;

CHARLES ANDREW and **CINDY ANN VAN WYK NO.**

In their respective capacities as trustees of the

MBHILIBHI TRUST Applicant

And

ADRIAAN JACOBUS VAN WYK 1st Respondent

THE GABLES (PTY) LTD 2nd Respondent

Neutral citation : ***Andriaan Jacobus Van Wyk & The Gabbles (Pty) Ltd & Ezulwini Municipality (1411/17) [2020] SZHC***

Coram : **M. Dlamini J**

Heard : **15th October, 2020**

Delivered : **16th November, 2020**

Functionaries ***:*** ***It is expected of tribunals or functionaries once they have discharged their duties to abide by the court's decision and leave main matters to be litigated by the parties who have substantial interest. If they oppose same, the court would investigate if such opposition was not mala fide. Where evidence of mala fide is present, the court would not hesitate to make an appropriate order as to costs in order to register its disapproval of such conduct***.[17]

Summary: Under a certificate of urgency, the applicant sought for orders directing respondent to approve or authorise a subdivision of property in terms of an order of both this court and the Supreme Court. The application was strenuously opposed by the respondent, firstly by raising a litany of points of law and later on the ground that the applicant had not handed the Mbhilibhi Trustees (Trustees) the guarantee as payment for the property under issue.

The Parties

[1] The 1st applicant is an adult Liswati, residing at Ezulwini, region of Hhohho. He is also a director of 2nd applicant. 2nd applicant is a company duly registered as such, with its principal place of business at Ezulwini, region of Hhohho.

[2] The respondent is a local government, established in terms of the Urban Government Act of No. 8 of 1969. Its main offices are at Ezulwini, region of Hhohho.

The Parties Contentions:

The applicant

[3] The applicant averred:

"AD BACKGROUND

*5. On or about the 7th December 2018 the above Honourable Court issued a judgment in favour of myself and the 2nd Applicant against my brother **Charles Andrew Van Wyk** and his wife **Cindy Anne Van Wyk** acting as representatives of their Trust, **The Mbhilibhi Family Trust** (hereinafter the Trust). The judgment pertained to the transfer of two Properties to myself and the 2nd Applicant respectively. This Court held that the Trust is ordered to sign all documents and take all necessary steps to give effect to and implement;*

*5.1 The Deed of Sale between (The Trust) and the 1st Respondent (myself) in respect of the remaining extent of portion 61 of Farm 51 Hhohho District Swaziland (now Eswatini) dated the 2nd August 2016 – measuring 6, 5841 ha upon 1st Respondent (myself) paying the sum of **E3,000,000.00** to the Mbhilibhi Family Trust; and*

5.2 *The Deed of Sale between the applicant and the second Respondent (The Gables (Pty) Ltd in respect of the remaining extent of Portion 21 of Farm 51 Hhohho District, Swaziland (now Eswatini) - piece of Land described as SUB A measuring 1, 9218 ha – upon 2nd Respondent (The Gables (Pty Ltd) paying the sum of* ***E1,200,000.00*** *or delivering a Toyota Landcruiser Diesel 2016 Model, whichever is greater to the Mbhilibhi Family Trust."*[1]

[4] The applicant proceeded:

"6. The High Court Judgment referred to in paragraph 5 above, was appealed against to the Supreme Court. The Supreme Court dismissed the appeal and upheld the High Court Judgment."[2]

[5] Pursuant to the judgment in their favour, the applicants commenced the process of registration. A subdivision was necessary. However, the following transpired, according to the applicants:

"8. The Respondent herein has refused to approve [sic] of the subdivision on the basis that the 2nd Applicant is not registered owner of the Property and cannot, in terms of

[1] Page 7-8 paragraphs 5, 5.1 & 5.2 of the book of pleadings

[2] Page 8 paragraph 6 of the book of pleadings.

the Respondent's internal policy, be allowed to move an application for the subdivision of Property belonging to a third party.

[6] The applicant then prayed:

> *"3. Directing the Respondent to approve and authorise the subdivision of the Property more fully described as* ***Remaining Extent of Portion 21 of Farm 51 Hhohho District*** *at the instance of the Applicants and / or anyone acting on their behalf;*
>
> *4. Directing the Respondent to do all things as are necessary to give effect to the High Court Judgment of the* ***7th December 2018****."*[3]

The respondent

[7] The matter was strenuously opposed by the respondent. In its opposition, respondent raised only points *in limine*. On the hearing date, this court, not inclined to hear the case on piece-meal basis, ordered respondent to answer on the merits. The matter was given a considerable postponement at the instance of both parties.

[8] The respondent had raised a number of points of law. It disputed that the matter was urgent. It pointed out that applicant had failed to exhaust internal remedies as per section 116 (2) of the Urban

[3] Page 4 paragraph 3-4 of the book of pleadings

Government Act. Applicant had no *locus standi* as it was not the registered owner of the property. It alleged misjoinder following that it was not a party to the previous matters leading to the judgments of the court and the Supreme Court.

[9] Lastly, it asserted that applicants had dismally failed to meet the requirements of an interdict. In its answering affidavit on the merits, respondent repeated its point *in limine*. There was only one new point raised and it read:

> *"21.*
>
> ***AD PARAGRAPH 11***
>
> *The contents thereof are denied. As appears from the Confirmatory Affidavit of the Trustee of the MBHILIBHI TRUST; No guarantee was furnished to the Trust in March 2020 as alleged in order to perfect the Applicants right or entitlement in terms of the Court Judgment."*[4]

Determination

[10] From the onset with regard to paragraph 21 of respondent answering affidavit as referred above, I must hasten to point out that there was no confirmatory affidavit filed by the Trustee as so deposed by respondent. For this reason, the assertion by respondent remain hearsay. It stands to be thrown out of the window root and branch as I

[4] Page 105 paragraph 21 of the book of pleadings

hereby do. The only remaining points therefore are the technical points raised.

[11] **Urgency**: This point was abandoned at the hearing. This was because the date of filing the answering affidavit was respondent's choice. Further, both parties suggested the date of hearing of the matter. Urgency had been breached by the respondent itself when it chose to answer at its leisure.

[12] **Failure by applicants to exhaust internal remedies**: The respondent asserted that applicant ought to have given it thirty days' notice prior to instituting the present application. This was in terms of Section 116 (2) of the Urban Government Act No. 8 of 1969. In its founding affidavit the applicants had averred:

> *9. The Respondent has advised that the [sic] an Order of the above honourable Court directing it to approve the subdivision be procured so as to comply with their internal policies which require that the registered owner of immovable property be the one that makes the application for the subdivision of property within the Ezulwini urban area."*[5]

[13] Applicant then attached an email from the respondent as evidence of its contention that it came to court at the advice of respondent. The email reads:

[5] Page 9 paragraph 8-9 of the book of pleadings

"With the proposed subdivision application, please provide a court order compelling the Municipality to approve a subdivision application without the current owner's consent, this way the Municipality shall be protected should this result in further litigation in the future."[6]

[14] In its answer to the above assertions, the respondent attested:

"19.

AD PARAGRAPH 9

*The contents of this paragraph are denied and the Respondent states that the context within which the email marked as **ANNEXURE C** was sent is being totally misconstrued and misrepresented. I state that the Respondents position as appears in the email dated **8th June 2020** marked as **ANNEXURE "EM1** and **EM2"** was that; the Applicant should compel the registered owners of the property to submit the Application for subdivision.*

*The email correspondence marked as **Annexure "C"** was written within the context of the Applicants Attorney seeking to justify why the mandate process should not be followed in which a response thereto by way of an express court order.*

[6] Page 85 of the book of pleadings

This did not however mean the Applicant could unilaterally seek to have to process of subdivision be approved without even joining the registered owners of the immovable property in these proceedings. I state that what is further astonishing in this particular circumstance is that the Applicant does not make any allegation that the registered owners of the immovable property have refused and / or have unreasonably failed to apply for a subdivision, so as to warrant the Respondent to subvert its own policies and procedures or to justify instituting legal proceedings for a court order compelling the Respondent to do so."[7]

[15] **EM2** is the same email attached by applicant which I have just referred to its contents. It was marked as annexure **"C"** by applicant**.** From the above, it is clear that respondent does not dispute authoring annexure C or EM2**.** There is nothing ambiguous with regard to annexure C or EM2. All the respondent required was a court order to the effect that it can approve the subdivision. This is exactly what the applicants have done. They have, on the advice or instruction by respondent approached this court to seek the very same court order. Annexure C1 or EM2 attached by applicant and respondent respectively is unequivocally on this point. Why the matter is opposed at the instance of the respondent is not clear. Under this circumstance, the words of **Pichard JP**[8] are apposite:

[7] Page 104 paragraph 19 of the book of pleadings

[8] **Cash Paymaster Services (Pty) Ltd v Eastern Cape Province 1991 (1) South Africa 324 at 353)**

> *"More often than not independent tribunals, having done their duty in terms of the provisions of Rule 53* ***take the attitude that they will abide the decision of the Court and leave the other matters to the interested parties to dispute before court****. When they do so, the Court will in the normal course of circumstances not grant costs against the tribunal, save if it is satisfied that the latter acted mala fide."*

[16] I understand **Pichard JP** to be stating the position of the law as follows: It is expected of tribunals or functionaries once they have discharged their duties to abide by the court's decision and leave main matters to be litigated by the parties who have substantial interest. If they oppose same, the court would investigate if such opposition was not *mala fide*. Where evidence of *mala fide* is present, the court would not hesitate to make an appropriate order as to costs in order to register its disapproval of such conduct.

[17] What exacerbates the position of the respondent is that it is clear that it is not an interested party to the main matter by reason that it has no interest at all, let alone a substantial one as required by law. Despite that, it challenges the applicant by deposing that applicant has no *locus standi*. This totally nose thumb the judgment of not only this court but the Supreme Court as well. Respondent is fully aware of the judgment in favour of the applicant. The respondent's lawyer represented the Trustees in the main matter. Respondent goes on to challenge applicant on matters between it and the Trustees. It is totally not understandable what business respondent has on whether the

Trustees received the bank guarantee or not. To add salt to the injury, respondent further opposed applicant's application on the ground that applicant had failed to satisfy the requirement of an interdict. Ask how applicant's prayers could be classified as an interdict, Counsel on behalf of respondent failed to provide any authorities to support respondent's case in that regard. This was despite his undertaking to do so. Again, this points to one direction. It is that respondent is all out to frustrate the applicant in its judgment. The conduct displayed by the respondent who depend entirely on innocent rate payers' money to run its establishment is not at all consistent with that of functionaries.

Costs

[18] From the above, I find myself compelled to import the wise exposition by **Pichard JP (***supra)* and ask, has the respondent as a functionary, not acted *mala fide* in defending this application in light of its own correspondence marked and attached by it as annexure EM2, calling upon the applicant to approach court and obtain an order for it to authorise the subdivision? From its litany of lame technical defences, the answer is obvious. It remains for an appropriate order of costs to be pronounced.

Orders

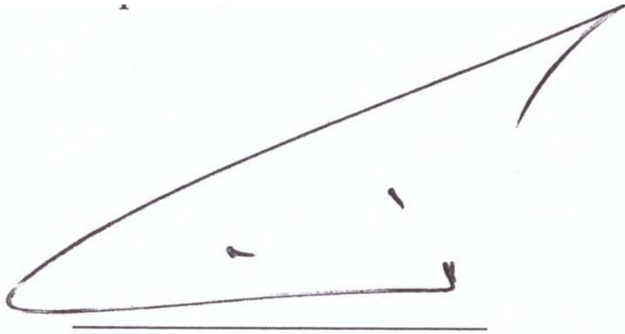
[19] In the result, I enter as follows:

19.1 Applicant's application succeeds;

19.2 Within three days of service of this order, the respondent is ordered to approve the subdivision Remaining Extent of Portion 21 of Farm 51 Hhohho district;

19.3 The respondent is ordered to do all ancillary acts to the order at para. 19.2 herein so as to give effect to the High Court judgment of 7th December 2018;

19.4 The respondent is ordered to pay applicant costs of suit at attorney- own- client scale.



For the applicant : **M. Tsambokhulu of Waring Attorneys**

For the Respondent : **T. Tengbeh of S.V. Mdladla and Associates**