THE HIGH COURT OF SWAZILAND

Civil Application No.1293/03

In the matter between:

CITY COUNCIL OF MANZINI	**Applicant**
And	
CAMBRIDGE HIGH SCHOOL (PTY) LTD	**1st Respondent**
J. KWARTENG	**2nd Respondent**
THE LUTHERAN CHURCH	**3rd Respondent**

CORAM : **MASUKU J.**

For the Applicant : **Mr B. Magagula (Robinson & Bertram)**
For the Respondent : **Mr E. M. Simelane**

RULING ON POINTS *IN LIMINE*
7th April 2004

In the year 2003, the Applicant, a local municipality, duly established in terms of the provisions of the Urban Government Act 8/1969 set out on a crusade to stop the seeming mushrooming of schools in its jurisdictional area, which in its view were operating illegally and in contravention of its development Code.

As a result of this crusade, the Applicant moved a number of applications before this Court interdicting the use of the various properties other than for residential purposes. The 1st Respondent is one of such schools.

The legal question for determination in this matter, and the Ruling of which it was agreed would equally apply to the related matters, being **CIVIL CASE NO.S 1290/2003 and**

1292/2003, is the legality or otherwise of the Manzini Development Code of 1991. The question, raised in *limine* by the Respondents is couched in the following language:-

> *"I submit that the Applicant wrongly instituted the application on an illegal statutory enactment, alternatively on an ultra vires enactment. The Town Planning Act of 1961 does not refer to any Development Code or provide for the establishment of such, but instead refers to the Establishment of Schemes in the course of preparation and operation of approved schemes."*

During the argument, Mr Simelane for the Respondent, raised a further point in his quest to have the Code declared invalid. He urged the Court to find that the Code was not

(a) promulgated by publication in the Gazette;
(b) approved by the Minister responsible, and
(c) reviewed periodically as peremptorily required by the Town Planning Act, 1961 and further that the Minister responsible did not grant an extension for the operation of the Code.

Relevant Legislative Enactments.

It is in my view clear that a just decision in this case requires a close examination and interpretation of the relevant provisions. The most relevant piece of legislation in this regard is the Town Planning Act, 1961, (hereinafter referred to as "the Act").

Section 8 of the Act provides the following:-

(1) Every town planning scheme shall have for its general purpose a co-ordinated and harmonious development of the urban area or other area to which it relates, including where necessary the reconstruction and redevelopment of any part which has already been sub-divided, whether there are or are not buildings thereon, in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and improvement of communications.

(2) A town planning scheme shall contain such provisions as may be deemed necessary

> or expedient for regulating, restricting or prohibiting the development of the are to which the scheme applies and generally for carrying out any of the objects for which the scheme is made, and in particular, for dealing with any matters mentioned in the Second Schedule to this Act."

The matters listed in the Second Schedule include but are not limited to *inter alia:-*

(i) The preparation of a contour or topographical map of the area;

(ii) Streets regarding grades, widths, intersections, volume and character of traffic, measures to ensure safety of travelling public, closing, deviations, cultivation of trees, provision of ornamental works to improve appearance of streets;

(iii) Extinction or variation of private rights of way and servitudes generally

(iv) The prohibition, regulation or control of advertisements in public places

(v) Lighting and water supply

(vi) Sewerage, drainage and sewerage disposal

(vii) The demarcation or zoning of areas to be used exclusively or mainly for residential, commercial, industrial or other special purposes.

(viii) Power of the responsible authority to remove, alter, demolish any obstructive work.

In relation to the Sections quoted above, the Respondents argue that the "Code" is unlawful because it is not envisaged by the Act. This stems from the use of the word "town planning scheme" in both sub-sections of Section 8. In the Respondent's view, the document must be called a "scheme" and nothing else. Calling it another name, in their submission, attracts invalidity.

Chapter 1 of the Code, entitled "General Provisions" provides as follows:-

1.1 Enactment and Title

(a) The regulations set forth herein shall be cited as the Manzini Development Code, 1991.

(b) The scheme shall have effect as a "scheme in the course of preparation" as of 23rd January, 1988.

(c) The scheme shall come into effect as an approved scheme upon promulgation of a Notice of approval in the Gazette.

(d) This Code shall apply to the Manzini Urban Area as from time to time declared under the Urban Government Act No.8 of 1969.

(e) The Town Council of Manzini shall be the local and responsible authority for enforcing and carrying into effect the provisions of this code."

In the Table of Contents, the document is described as follows:-

"MANZINI TOWN PLANNING SCHEME DEVELOPMENT CODE 1991"

The then Minister for Housing and Urban Development, The Hon. J.P. Carmichael, in giving his certificate of consent, as required by Section 15 of the Act, on the 12th September, 1996, referred to the Code as the "Manzini Town Planning Scheme", consented to in terms of the Town Planning Act, of 1961.

I have gone to the above lengths to show that wittingly or unwittingly, the drafters of the document used the words "scheme" and "code" interchangeably. In particular, a cursory look at 1.1 (a) to (e) quoted above, bear my conclusion in this regard out.

In my view, the question to be answered is not whether the word used to call the document is "scheme", as used in the Act or "code" used interchangeably with "scheme" in the document. The question rather is whether the document, whether one calls it a "scheme" or "code" meets the requirements carefully set out in Section 8(1) and (2) of the Act, regarding the purpose of the document and the matters it provides for.

It is abundantly clear that the "scheme" or "code" of Manzini was designed to meet the purposes set out in Section 8 (1) of the Act. Furthermore, in its text, it makes provision for the matters set out in Section 8 (2). It is furthermore undeniable that it also makes provision

for the particular matters set out in the Second Schedule to the Act and referred to in Section 8 (2).

In view of the foregoing, the indubitable conclusion is that the "code" or "scheme" is the document specifically provided for in the Act, regardless of the name by which it is called. The position adopted by the Respondents in this regard, is in my view highly fastidious and is unduly technical. What we must focus on is the content of the document rather than the label.

I therefor find that nothing turns on the use of the word "code" as opposed to "scheme" and in any event that the use of the word "code" in the document does not serve to invalidate the document. This point must be dismissed, as I hereby do.

The next argument to consider relates to the promulgation of the scheme. Mr Simelane, argued that the scheme was not promulgated in the Government Gazette, notwithstanding the express provisions of Section 20 (2) of the act and Article 1.1 (c) above. Mr Magagula, for the Applicant provided the Court with a copy of a Government Gazette. Legal Notice 156 of 1996 reads as follows:-

"THE TOWN PLANNING ACT, 1961

(Act No.45 of 1961)

APPROVAL AND COMING INTO FORCE OF SCHEMES

(Under Section 20)

In exercise of the powers conferred by Section 20 of the Town Planning Act, 1961, the Minister of Housing & Urban Development, notifies the general public that the Manzini Town Planning Scheme (1992-2011) has been approved.

Signed

M.C. DLAMINI

Principal Secretary"

This Legal Notice renders the Respondent's argument *caedit quaestio*, as it is clear that the

scheme was promulgated accordingly. This Notice fully disposes of the Respondent's argument which must, in my view, fail.

The Respondents, not to be out done in their quest to have the Code declared invalid, had another string up their bow. They argued that contrary to the provisions of Section 21 (4), the scheme has not been reviewed and it is therefor no longer valid and is not of no force or effect.

Section 21 (4), upon which reliance is placed reads as follows:-

> *"Every approved scheme shall be reviewed periodically at intervals of not more that five years.*
>
> *Provided that the Minister may on application extend the interval in any case upon such conditions as he may deem proper."* (Emphasis my own)

The question to be determined in this case is whether the underlined word "shall", occurring above is peremptory or merely directive. Mr Simelane argued that it is peremptory. In order to decide on the effect of the nomenclature employed, Maxwell on Interpretation of Statutes, 12th Edition, Sweet and Maxwell, 1969, states the following at page 314: -

> *"It is the duty of Courts of Justice to try to get at the real intention of the Legislation before carefully attending to the whole scope of the statute to be examined."*

The whole scope of the Act appears as the following:-

> *"An Act to make provision for the preparation and carrying out of town planning."*

It would therefor appear in my view that the interpretation contended for by Mr Simelane would collide head on with the Legislative intention expressed above. Chris Botha, in his work entitled "Statutory Interpretation" 3rd Edition, Juta & Co, 1998 says the following at page 138: -

> *"If the wording of the provision is in positive terms, and no penal sanction has been included for non-compliance of the requirements, it is an indication that the provision in question should be regarded as being merely directory...Failure to comply with a peremptory provision would leave ensuing act null and void, while the non-compliance with a directory provision will not result in nullity."*

It is clear from the foregoing that the provision in question, although the word "shall" is used, does not include a penalty for non-compliance. All the indications therefor are that it is a directory provision and the failure to comply therewith does not result in the nullification of the scheme. See also **NKISIMANE AND OTHERS VS SANTAM INSURANCE CO. LTD 1978 (2) 430 at 435.**

It is, in my view, significant that the reviewing of the schemes periodically does not always mean that the scheme must be changed. All that depends on the continued suitability of the schemes in question. To then hold that because there is no review, the scheme is null and void, seems to take the matters beyond the Legislative intention expressed. I interpolate to mention as well that this point was not raised in the papers and in which case, the Applicant, would have responded to it. It was only raised in argument in Court and no evidence was in any event adduced to show that the scheme was or has never been reviewed as alleged. All that I say above is therefore subject to this overriding consideration.

In dealing with the peremptoriness or otherwise of the language used in an enactment, it is imperative to take heed to the wise injunctions of Trollip J.A. in **NKISIMANE VS SANTANA INSURANCE CO. LTD 1978 (2) 430 (AD) at 433 H – 434 A**, where the following is recorded: -

> *"Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non-or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular."*

At page 434 B, Trollip J.A. continued and said: -

> *"On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequences."*

This appears to be the case in this matter in my respectful view.

What the Respondent advocates for *in casu,* is what Lord Denning warned against in the following language in **SCARFORD COURT ESTATE LTD VS ASHER (1949) 2 KB 481 at 499**, where the following recorded:-

> *"We do not sit here to pull the language of Parliament to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up, to destructive analysis."*

Another issue, that in my view militates against the Respondent's argument, even if it can be held that the scheme becomes null and void, if not reviewed, and no sanction is sought, is the fact that the Minister, in the Gazette referred to above, approved the operation of the scheme From 1992 to 2011. This would appear to be the duration of the schemes as approved.

I am of the view that these points of law must therefor be dismissed. I form the view that these points *in limine* were not raised with any degree of bona fides and amounted to a waste of the Courts time. I therefor make an adverse order for costs on the ordinary scale, to follow the dismissal.

T.S. MASUKU
JUDGE