IN THE HIGH COURT OF SWAZILAND

Civil Case No. 3218/2007

DAVID DLAMINI	**1st Applicant**
GEDION GWEBU	**2nd Applicant**
PETER DLAMINI	**3rd Applicant**
MAMATHE DLAMINI	**4th Applicant**
SIBONGILE MAVUSO	**5th Applicant**
RICHARD SACOLO	**6th Applicant**
EUNICE DLAMINI	**7th Applicant**
KENNETH KUNENE	**8th Applicant**
PROJECT AFFECTED PEOPLE IN THE CONSTRUCTION OF THE MBABANE BYPASS (MR – 3) ROAD	**9th Applicant**

And

MINISTER OF PUBLIC WORKS AND TRANSPORT	**1st Respondent**
WBHO CONSTRUCTION (PTY) LTD	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**
Coram	**S.B. MAPHALALA – J**
For the Applicants	**MISS C. DLAMINI**
For the 1st and 3rd Respondent	**MR. V. KUNENE AND MR. T DLAMINI (Attached to the Attorney General's Chambers)**
For the 2nd Respondent	**MR. J. HENWOOD**

JUDGMENT

25th October 2007

---

[1] The Applicants have filed an urgent application for relief in the following terms:

1. Dispensing with the usual forms and procedures and time limits resulting to the institution of proceedings and allowing this matter to be heard as a matter of urgency;
2. That a rule *nisi* issued calling upon the Respondents to show cause on a date to be appointed by the Honourable Court why an order in the following terms should not be made final;

That the 1st Respondent's ministry, being the Ministry of Public Works and Transport, as well as the 2nd Respondent be and are hereby interdicted from demolishing the homes of the Project Affected People of Mangwaneni, Manzana and Makholokholo areas through which the construction of the New Mbabane Bypass (MR – 3) road is carried out.

That the 1st Respondents' Ministry, being the Ministry of Public Works and Transport as well as the 2nd Respondent be and hereby interdicted from continuing with the construction of the upgrading of the Mbabane – Ngwenya Road proposed New Mbabane Bypass (MR – 3) Road pending finalization of this matter;

That the omission of the Applicant to individually cite all the Project Affected People be and is hereby condoned in this application;

3. Directing that prayers 2.1, 2.2 and 2.3 operate as a rule nisi with immediate and interim effect pending the outcome of these proceedings;

Directing the Deputy Sheriff to execute any order made by this Honourable Court and to be duly assisted by the members of the Royal Swaziland Police, particularly from the Mbabane Police Station.

4. Calling upon the 1st Respondent to show cause why the above Honourable Court should not cancel the Environmental Compliance Certificate issued by the Director of Environment on 28th July 2004 on the basis of its failure to comply with the conditions therein.

   Annexed hereto marked "PAP1" is a copy of the said certificate

Alternatively, calling upon the 1st Respondent's Ministry aforesaid to show cause why the Environmental Compliance Certificate issued by the Director of Environment on the 28th July 2004 should not be suspended pending full compliance with special conditions 5 and 10 therein and Regulation 15 and 16 of the Environment Audit. Assessment and Review Regulations, 2000.

Annexed hereto marked "PAP2" is a copy of the said Regulations.

5. Granting costs of this application in terms of Section 58 of the Environment Management Act No. 5 of 2002.
6. Granting any further and/or alternative relief in favour of the Applicants in terms of the provisions of the Environment Management Act No. 5 of 2002.

Annexed hereto marked "PAP 2b" is a copy of the said Act.

[2] The application is founded on the affidavit of the 1st Applicant one David Dlamini in his personal capacity and as a Chairman of the Project Affected People in terms of the Resettlement Plan prepared in terms of the Compliance Mitigation Plan (CMP) of the Mbabane bypass (MR – 3), and in terms of Section 58 of the Environment Management Act No. 5 of 2002. In the said affidavit a number of annexures are filed from PAP1 to PAP 13. All the other Applicants have filed confirmatory affidavits to the Founding affidavit of the 1st Applicant.

[3] In view of the urgency in which this application has been brought the Respondents have not filed their answering affidavits in terms of the Rules of Court but have filed Notices to raise points of law followed by Supplementary Notices:

[4] In summary form the points of law raised by the Respondents are as follows and these points will be revealed in detail when I deal with each point raised:

1. Urgency.
2. Description of the parties.
3. Requirements of an interim interdict.

4. Loci *standi*.
5. Clear right.
6. Balance of convenience.
7. No other satisfactory remedy.
8. Provisions of Section 7 (1) (b) of the Roads and Outspan Act No. 40 of 1931.
9. Provisions of the Environment Management Act read together with Regulation 18 of the Environmental Audit, Assessment and Review Regulation of 2000.
10. Non – joinder.

[5] The arguments in this case took more than two weeks of highly charged submissions on all sides. In order to do justice in this important case I shall address each point of law as outlined above *ad seriatim* and deal with the arguments of each attorney for the Respondents under a similar heading. I proceed as follows:

1. The issue of urgency.

[6] It is contended by the Respondents that this matter is not urgent or urgency is self-created. The issue of resettlement of those affected by the construction of the road began in late 2005. In this regard Counsel for the Respondents referred the court to the trilogy of cases by this court on urgency. The trilogy of cases includes the celebrated case of *Humphrey H. Henwood vs Maloma Colliery and another – Civil Case No. 1623/1993* (*per* Dunn J), the case of *H.P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Limited – Civil case No. 788/1999 (unreported)* (*per* Sapire CJ, (as he then

was) and that of *Megalith Holdings vs RMS Tibiyo (Pty) Ltd and another – Civil Case No. 199/2000 (unreported)* (*per* Masuku J). In the latter judgment Masuku J held at page *5* as follows:

> "The provisions of Rule 6 (25) (b) exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear ex facie the papers and may not be gleaned from the surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's Counsel".

[7] In *H.P. Enterprises* matter *(supra)* Sapire CJ held at pages *2 – 3* that:

> "A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate that the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deteriotion to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but must give rise to a reasonable fear that it immediate relief is not afforded, irreparable harm will follow".

[8] Rule 6 (25) (a) and (b) which governs urgent applications, provides as follows:

> "(a) In urgent applications, the Court or Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the Court or Judge, as the case may be, seems fit.
>
> (b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the Applicant shall set forth explicitly the circumstances

which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".

[9] The Applicants in the Founding affidavit of one David Dlamini who is the 1st Applicant where the following averments are made regarding urgency at page 17 of the Book of Pleadings:

AD INJURY AND URGENCY

The 2nd Respondent as I speak is busy heartlessly demolishing houses of helpless members of some of the members of the 9th Applicants.

I refer the Honourable Court to annexure "PAP8" which is the last structure they demolished belonging to an elderly person with nowhere to go to thereafter on the 31st August 2007.

13.1.1 The 1st Respondent's Ministry as the project proponent, more especially the Project Implementation Unit, knows all of the affected Project Affected People's concerns but is very insensitive;

13.1.2 The Project Affected people's plight and chances of getting help from anywhere are diminishing each day as the project continues to be implemented in this way;

13.1.3 The Applicants are left in a "worse of" situation as this happens only because of the 1st Respondent's Ministry deliberate failure and/or neglect to observe the Environmental Laws cited herein and the Constitution of this Kingdom.

13.1.4 The 1st Respondent himself has on numerous occasions conceded that the said environmental procedures have not been adhered to, but at all material times failed to even put in place supplementary speedy measures to avoid extreme situations of misery in this matter;

13.1.5 The Applicants, in particular the 9th Applicants have lost hope and faith that these injuries will ever be attended to by the 1st Respondent and his Ministry because of the following reasons;

13.1.6 On or about 30th May 2007, the 9th Applicants delivered a petition to the 1st Respondent on the numerous grievances resulting from the violation of the EIA/CMP Reports and Resettlement Plan;

13.1.7 Although an ultimatum of 5 days was stated therein it was only after about a month had elapsed that the 1st Respondent thereto;

I annexed copies of the said petition and the responses thereto marked "PAP13".

13.5.3 The response lacked commitment and, to say the least, demonstrate the lack of the will to comply with the Resettlement Plan, especially at pages 8 – 9. The Applicants received with emotional shock that the 1st Respondent actually saw nothing wrong with the deviation;

13.5.4 It became apparent that the fate of the Applicants, in particular the 9th Applicants, is "not the 1st Respondent's business" hence Applicants had to find an alternative way of compelling the 1st Respondent's Ministry to comply in full with the EIA/CMP Report and Resettlement Plan, *viz* to solicit this Honourable Court's intervention in this matter in terms of the Environment Management Act.

13.5.5 We have been advised and verily believe that an interdict is the only remedy available to the Applicants in lieu of this state of affairs.

13.5.6 Further we have been advised that an interdict is by its nature a speedy remedy, hence the need to file an urgent application with this Honourable Court;

13.5.7 I humbly submit that had the 1st Respondent's Ministry complied with the EIA/CMP Reports and Resettlement Plan it would not have suffered any prejudice as the whole process would only have taken four (4) months prior to the excavation of the road site as it more fully appears in page (xi) of the Plan;

13.5.8 Conversely the Applicants will suffer irreparable harm if the 1st Respondent's Ministry is not compelled to take on board grievances of the Applicant's in implementing the project.

13.5.9 Suspending the Environmental Compliance Certificate pending compliance with the Resettlement Plan is the most effective and legal remedy available to counteract the irreparable harm likely to be suffered by the Applicants;

13.5.10 Further it is unjust for the 1st Respondent's Ministry to continue to enjoy the rights granted to it by the Environmental Compliance Certificate as same was obtained through misrepresentation to the African Development Bank and the Swaziland Environment Authority.

[11] The Applicants contend that the matter is urgent in the following ways:

(a) Respondents are practically demolishing houses of the Applicants periodically as road construction continue. Such is done intentionally and negligently without any consideration for compensation as per the 1st Respondent's Ministry in approved resettlement plan. The latest but not last being one home demolished on the 31st August 2007, belonging to an elderly woman without prior notice. In this regard the court was referred to the Notice of application at page 17 of the Founding affidavit of David Dlamini.

(b) Applicants submit further that those houses that are not demolished yet but which lie on the road map will soon be destroyed as the process goes on as they either have severe cracks or some very few metres from the actual road maps contrary to acceptable standards.

(c) Some homesteads are hanging on cliffs due to road works and through any slight rains and/or vibrations they can

collapse. In fact they are a potential danger to the inhabitants. Furthermore there are no satisfactory compensation measures and/or alternative housing offered to the owners or dwellers. It is submitted that in terms of the plan the 1st Respondent's Ministry has the primary duty to address these anomalities, which it now feel they have been "overtaken by events" or not possible to undertake or even "costly".

(d) It is submitted further that directly affected Applicants and those speaking on their behalf started as way back as the said 2005 to register concerns with the relevant structures identified by the Resettlement Plan but they fell and continue to fall on deaf ears.

(e) Resettlement affected homestead was and still is the full responsibility of the 1st Respondent's Ministry but it is neglecting to do same to such an extent that lives of occupants are extremely endangered. In this regard the court was referred to CMP page 7 – 9 and Resettlement Plan at page 39.

(f) The 1st Respondent's Ministry has violated the Environment Compliance Certificate, an Act which entitles the Applicants to invoke Section 58 of the Environment Management Act, 2002 for this interdict.

[12] According to the allegation that the requirements of Rule 6 (25) (b) have not been complied with the Applicants contends that they have explicitly complied with this Rule as more fully appears in the Founding

affidavit of David Dlamini in paragraph [9] *supra*. The redress was to follow the structures placed by the 1st Respondent's Ministry in the Resettlement Plan but same has been disregarded by the 1st Respondent itself amidst the chaotic situation that exist on road site. In fact this fact is fully acknowledged by the 1st Respondent himself. The 1st Respondent Ministry has clearly failed, to comply with the conditions of the Environmental Compliance Certificate much to the prejudice of the project affected parties and this necessitated the Applicants to invoke the Environmental Management Act for substantial redress.

[13] In the Founding affidavit of David Dlamini in paragraph 13 averments are made on urgency and in paragraph 14 thereof further averments are made that no other satisfactory remedy is available. In my assessment of the averments in the Applicants Founding affidavit and confirmatory affidavits the Applicants have proved the requirements of the rule governing urgency and I would thus hold that this point of law *in limine* by the Respondents cannot succeed and the matter is accordingly enrolled in terms of the Rules of court.

2. Description of the parties.

[14] The argument in this regard is that the 9th Applicant is not fully described in the application. The names of the members are not mentioned. Further that the 2nd Respondent is not clearly described. If the 2nd Respondent is a company it has to be mentioned in terms of which law is that company registered or incorporated.

[15] On the other hand Applicants contend that under the Rules of court there is no specific provision for the description of parties in applications. The parties are known to each other in their relationship as "Project Affected Parties" a name which was neatly designed by the 1st Respondent's Ministry as the project proponent in the CMP and the Resettlement Plan documents. In this regard the court was referred to Rule 17 (4) of the High Court Rules and the textbook by *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition, 1997* at page *121* and the court was further referred to the case of *Kayalandi Town Committee vs Mkhalo and others 1991 (2) S.A. 630.*

[16] Having considered the pros and cons of the arguments by the parties in this regard I am satisfied with what has been said by the Applicants that the parties are known to each other in their relationship as "project affected parties" a name which was designed by the 1st Respondent's Ministry as the project proponent in the CMP and the Resettlement Plan documents. I have also adopted the approach in cases in other jurisdictions on public interest litigation including the South African case of *Van Rooyen and Others vs The State and zothers 2001 (4) S.A. 396* and that of *Rogers Muema Nzioka and others vs Tiomin Kenya Limited (unreported) – Civil Case No. 97 of 2001 in the High Court of Kenya.* I have also considered what is stated by the learned author *Michael Kidd, Environmental Law: A South African Guide, Juta and Co. 1997* at page *27* where the author states that courts on environmental law issues have tended to take a relaxed approach on the *locus standi* issue to enable public interest litigations. The learned author states that the common law approach is an "obstacle" to an individual's being to be able to vindicate the public interest. Furthermore Section 58 of

the Environment Management Act confers unlimited *"locus standi in judicio"* of prospective Applicants who would want to sue on public interest.

[17] In view of what I have said above in paragraph [16] I condon the citation of the parties due to the complexities of the matter.

3. Requirements of an interdict.

[18] The third point *in limine* raised by the Respondents is that the Applicants have not satisfied the requirements of an interim interdict. Although the Applicants have alleged a clear right but they have failed to show on the papers what the clear right is and in what way are they directly and adversely affected. The Applicants have not stated or alleged if the balance of convenience favour them at all. The Applicant do have an alternative remedy. The Applicants can always sue Government for damages if they are not satisfactory compensated.

[19] The Respondents further contend that Applicant's have failed to set out fully the right which they seek protection and/or enforcement of in that the basis of the Applicants rights have not been set out. Further that the Applicants have failed to set out how and in what manner the balance of convenience favour the granting of an interdict as they seek to stop the entire project being the upgrading of the Mbabane – Ngwenya main road yet, the alleged rights which they seek to protect relate to properties which are constructed on only a small fraction of the total project.

[20] The Applicants on the other hand contends that they have satisfied the requirements of an interdict in full in their affidavits. The affidavits state explicitly the numerous grievances and that the project should be suspended temporarily pending addressing same in terms of the Environment Management Act, 2002. Further that the nature of the complainants by the Applicants are life threatening yet they are taken lightly by the Respondents. Counsel for the Applicant further filed arguments in paragraphs (c), (d), and (e) of her Heads of Arguments.

[21] Having considered the above arguments by the parties, it would appear to me that the nub of the dispute between the parties revolves around the operations of the BRC – Bypass Resettlement Committee (hereinafter refer to as the "committee") which according to the documents filed of record is tasked with compensating the people who have been re-settled by the project. It is also common cause between the parties that the money for compensating these people has been provided for by the project. There appears to be a communication breakdown between the parties leading to this urgent application before court. The Applicants say the BRC no longer exist. Whilst Respondents state that the BRC exist but has not been utilized by the Applicant since 2003. To this end the Respondents have led the evidence of the Secretary of the BRC who testified to this effect.

[22] In view of this confusion it is my considered view that this committee ought to be activated to address the plight of the Applicants as a matter of urgency. For this reason I would postpone this matter for a period of 21days from the date of this judgment and further order that Applicants should within 7 days from the issuance of this judgment furnish to the Secretary of

the BRC through their attorney with their claims and within 21 days from today's date the committee to address the Applicants' claims. Further on the return date being 26th November 2007, the Secretary of the BRC should file a written report to this court on how the complainants have been addressed. The court will then issue its final judgment on the points raised by the Respondents including the issue of costs, and so it is ordered.

S.B. MAPHALALA

JUDGE