IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIV.CASE NO.1545/92

In the matter between:

UNITED SECURITY HOLDING (PTY) LTD
AND TWO OTHERS Applicants
and
JOSEPH PATRICK HAYES & ANOTHER Respondents

C O R A M : DUNN J.
FOR THE APPLICANTS : ADV. FLYNN
FOR THE RESPONDENTS : ADV. SMITH

JUDGMENT
26th February 1993

This is an application by the respondents for leave to file supplementary affidavits. The main application was filed under a certificate of urgency on the 27th November 1992. A rule nisi was issued on the 3oth November in terms of that application in the following terms -

> That a rule nisi be and is hereby issued calling upon the 1st Respondent to show cause on the 11th December 1992 why an Order in the following terms should not be made:
>
> 1. That the Respondent be interdicted for a period of five years commencing in respect of the 1st Respondent on the 9th November 1992 and in respect of 2nd Respondent on 31 October 1992 from, either as

2/ ... ...

principal, agent, representative, shareholder consultant, advisor, financier, investor or in any other like capacity directly or indirectly being associated or concerned with interested or engaged in or interest themselves in any business company or other association of persons which carries on the business of providing security or escort services which, without limiting the generality hereof, includes the provision of static and mobile guards, reaction services, security communication and devices, security advisory services and other protection services, anywhere in the kingdom of Swaziland.

2. That the Respondents be interdicted for a period of five years commencing on the 9th November 1992 in respect of the 1st Respondent and the 31st October 1992 in respect of 2nd Respondent from directly or indirectly soliciting the custom of or attempting to solicit the custom of any person, firm, body corporate or incorporate which the client of either the 1st 2nd or 3rd Applicant in respect of business referred to in paragraph 1.

3. That the Respondents be ordered to pay the costs of this Application.

4. That the Rule nisi operate as an interim interdict restraining the Respondents in the terms set out in the Rule nisi pending determination of this Application.

The respondents filed answering affidavits on the 10th December 1992 and the rule was, on the return date, extended to the 29th January 1993 to enable the applicants to file

/replying...

3/ ... ...

replying affidavits. Replying affidavits were filed on the 28th January 1993. The affidavits and annexures filed up to that stage are fairly lengthy and deal with a restraint clause, a matter of some complexity, contained in an agreement between the parties.

The present application was filed by the respondents on the 9th February 1993. The respondents set out that the facts sought to be added to their answering affidavits are relevant to the issue to be decided in the main application. They explain that these facts were brought to the attention of their attorney but "as a result of an oversight on his part", the facts were not included in the answering affidavits. The "oversight". referred to is in relation to paragraphs 16; 16.2; 16.3 and 17 of the founding affidavit. The respondents did not deal with these paragraphs in their answering affidavits and wish to deal with them in the supplementary affidavits. The respondents further set out that if the relief sought is not granted they will be irreparably prejudiced in their opposition to the main application.

The application is opposed by the applicants on the grounds -

(a) that the respondents have not given a proper or satisfactory explanation which negatives culpable remissness on their part and

(b) that the facts and information contained in the supplementary affidavits are not in the nature of additional material which could have been ommitted by an oversight but that the supplementary affidavits constitute a complete re-draft of the original answering affidavit.

/4 ... ...

The ordinary rule is that three sets of affidavits are allowed. These are supporting afidavits, answering affidavits and replying affidavits. The court has a discretion to permit the filing of further affidavits. **See Rule 6(13) and Herbstein and Van Winsen, THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA 3rd Ed. 74** and the authorities there cited. The question of the court's discretion in this regard has been the subject of numerous decisions of the South African courts. These decisions are highly persuasive in our courts, as they deal with a South African Rule of court identical to our Rule 6. These decisions have shown a reluctance to lay down hard and fast rules defining the extent of the court's discretion in such matters. The following is stated by **Holmes J.** in the case of **MILNE N.O. v. FABRIC HOUSE (PTY) LTD 1957(3)SA 63(N) at 65-**

> In my view it is neither necessary nor desirable to say more than that the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that basically it is a question of fairness to both sides."

In the case of **JAMES BROWN & HAMER (PTY) LTD v.SIMMONS N.O. 1963(4)SA 656 (AD) OGILVIE THOMPSON JA** stated -

> It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that these general rules must always be rigidly applied: some flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him must necessarily also be permitted.

It is in my view, incumbent upon an applicant in such applications to show good cause for the relief sought. He must give a satisfactory explanation for his failure to set out his case at the appropriate time and in the appropriate set of affidavits.

I have read the supplementary affidavits which are the subject of this application. I must confess that I have great difficulty in appreciating what additional facts the respondents seek to place before the court. Apart from the averment of an oversight in so far as responding to paragraphs 16; 16.2; 16.3 and 17 of the founding affidavit and the replies thereto which the respondents have set out in the present application there is nothing which is in the form of a reply to the founding affidavit. The answering affidavits filed by the respondents replied paragraph by paragraph to the applicants' affidavit. The respondents do not in the present application indicate which paragraphs in their answering affidavits, they wish to supplement. I take as an example the affidavit of the 1st respondent in the present application. He sets out at paragraph 2 that "the facts hereinafter set out are highly relevant to the issue at hand and that the dispute cannot properly be determined without the facts being brought to the attention of the above Honourable Court". The 1st respondent then proceeds from paragraph 3 to give his life history and how he ended up in Swaziland from the United Kingdom. He sets out how he set up business in Swaziland and how that business merged with that of the applicants'. He states that if the restraint clause in the agreement with the applicants is enforced he will be unemployable and denied the right to earn a livelihood in Swaziland for a period of five years. There is no indication as to what averment in the founding affidavit all this information seeks to answer. The question of the restraint clause and its effect was

/specifically...

specifically replied to by the 1st respondent at paragraph 4 of his answering affidavit. The same applies with the affidavit of the 2nd respondent. The 2nd respondent does not indicate what averment/s in the founding affidavit the contents of paragraphs 3 and 4 of his affidavits seek to reply.

It was necessary for the respondents to deal separately with each paragraph of their answering affidavits an indicate in what manner and to what extent they wished to supplement such paragraphs. To allow the application as framed would be to throw the original application as it stood on the 8th February 1993 into total confusion. I cannot allow the application in the wide terms in which it is requested.

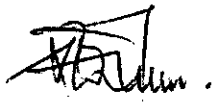
The only issue in the present application which requires consideration is that relating to the alleged oversight on the part of the respondents' attorney to reply to paragraphs 16 and 17 of the founding affidavit. The respondents have set out the reply they intend making to these paragraphs. The averment of the oversight is not confirmed by the relevant attorney. One would have expected that an affidavit would have been filed by the attorney confirming this averment by the respondents. The question is then as to whether or not the door should be shut to the respondents as a result of such failure. One must, I think, adopt a robust approach in this regard. The respondents indicate that there was an oversight on the part of their attorney. They are still represented by the same attorney who has now briefed counsel. It is most unlikely that such an oversight would in fact be imputed to the attorney if that were in fact not the position. The paragraphs in question dealt with serious issues relative to the restraint clause and the grant of the interim relief which the

/applicants...

applicants obtained. There is force in the submission that the failure to reply to these paragraphs, containing such serious averments, can only be explained on the basis of a genuine oversight.

I allow the application to supplement the respondents'answering affidavits by including the replies to paragraphs 16 and 17 as set out at paragraphs 6; 7 and 8 of the affidavit filed by the 2nd respondent in the present application. Leave is granted to the applicants to reply, if necessary, to the answering affidavit as supplemented.

The respondents are to pay the costs occasioned by this application including the costs of such reply as the applicants may have to file as a result of this application.



B. DUNN

JUDGE