IN THE HIGH COURT OF SWAZILAND

Civil Case No.977/92

NATIONAL HOUSING BOARD TENANTS' ASSOCIATION

v.

NATIONAL HOUSING BOARD
HUMAN SETTLEMENT AUTHORITY
ATTORNEY GENERAL

QUORUM	Hull, C.J.
FOR THE APPLICANT	Mr. Ntiwane
FOR THE FIRST RESPONDENT	Mr. Mabuza

ORDER
(14/6/93)

On 4th August 1992, the National Housing Board Tenants' Association filed an application on a basis of urgency for a rule nisi in the following terms:

(a) Interdicting and restraining the National Housing Board from -

(i) imposing rental increases of 16 percent and;
(ii) locking out or ejecting its tenants from its estate -

"pending the matter being finalised"; and

(b) Directing that a Commission of Enquiry be set up to look into the question of new leases and rental increments and that the matter be referred to the Human Settlement Authority -

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and for incidental relief.

It also sought an order in terms of paragraph 2(a) on an interim basis, i.e.-pending the return day.

The Association's founding affidavit was sworn by Mr. Nelson Musa Sibandze, who has stated in paragraph 1 of it that he is the president of the Association authorized to give the affidavit pursuant to the power of attorney and a resolution of the Association annexed to it.

In paragraph 6 he has stated "The applicant represents tenants occupying various properties owned by the first respondent and has the mandate to bind the said tenants."

Thereafter his affidavit recounts a history of negotiation between the Association and the Board following an intimation by the Board that it intended to increase the rentals for the properties owned by it. Mr. Sibandze says that, appreciating that the Association was an interested party, the Board's directors delegated to its management the task of holding negotiations with the Association's committee. The General Manager of the Board invited the committee accordingly to meet with management. They did so, on two occasions, but no agreement could be reached. The Board then referred the matter to the Minister for Housing and Township Development as an arbitrator. On 29th June 1992 the Association was invited to send its representatives to a meeting to be held on the following day at the Minister's Office. Because of the short notice, it could not do so. Thereafter on 1st July 1992, the Board issued a notice to all of its tenants saying that its rents would be increased by 16 per cent with effect from that day and requiring the tenants to sign lease agreements by the end of July 1992.

The president goes on to assert that the Association's members take the view that the Board is a non-profit making body which is legally bound to provide affordable housing. He, the president, further asserts that for various reasons specified by him the Board is not justified in increasing the rents as it has done, and that a Commission of Enquiry should be set up to investigate the Board's affairs.

On 5th August 1992, the High Court made a rule nisi as sought, returnable on 28th August, and ordered the interim relief sought, pending the finalisation of the matter. This order was expressed to have been made by consent.

On 12th August 1992 the Board filed notice of its intention to oppose the application.

It also filed an opposing affidavit by its General Manager, Mr. T.J. Dlamini, who deposed in the first paragraph that he was authorised to give the affidavit.

In paragraph 4, he has admitted that the Association itself is a non-profit making body and he annexes at 'A' what he describes as a copy of its constitution. He denies however that the Association represents tenants of properties owned by the Board and that it has a mandate to bind them.

The General Manager agrees with the history of events leading up to the meeting that was to be held in the Minister's Office. However, he explains that he proposed that the Board's management and the Association's committee should meet as the result of a recommendation from the Minister that the Board should try and discuss the question of the increase. He also explains that the 16 per cent increase was an award by the Minister at the meeting, in the Minister's Office, to which the Association's representatives had been invited.

As to the other matters raised in the founding affidavit, the General Manager states that the Board is fully empowered to increase (or decrease) rents, and in the absence of signed leases to eject its tenants on one month's notice. He denies the other allegations made by the Association generally and specifies reasons why the increases were necessary.

I think it is worth noting in passing, that he asserts that the setting up of a Commission of Enquiry is the prerogative of the Minister, in terms of the Commission of Enquiry Act 1963. (No. 35 of 1963).

On 13th August 1992, the Board applied for the matter to be set down for hearing on the contested roll on 14th August. On that latter day, the contested motions judge declined to hear it indicating that he had not been given sufficient notice. He ordered it to be postponed to a date to be fixed but he also said that certain points raised in limine could be included on the contested roll on a Motion Day.

On 27th August the Association lodged its affidavit in reply, also from its president. In it, he states that the constitution produced by the General Manager of the Board was not the Association's constitution. He annexes, at "X" in the replying affidavit what he describes as the constitution as amended"

Thereafter, on 4th November the Board applied to have the points in limine set down for argument in the contested motion court on 13th November. According to the court's records it came on for hearing first on 20th November and then on 27th November. On both occasions it was postponed, presumably at the request of the parties and eventually until 4th December. On that day, I think because of the state of the list it was stood over until 8.30 a.m. on Monday 7th December, but there may have been some misunderstanding because according to my minute on that

latter day, there were no appearances and the matter was accordingly postponed sine die for a date of hearing to be set. In the end, the matter came in for hearing on the points in limine on 19th February 1993 on the contested roll, having been earlier postponed on 5th and 12th February.

The first point in limine, taken by the Association, was that it did not appear from the face of Mr. Dlamini's founding affidavit, in the absence of a resolution, that he was authorised to give it on behalf of the Board. This is in my view a very technical objection and I do not consider that it can be sustained. He has said in the affidavit that he is the General Manager of the Board and that he is authorised to make the affidavit. The Association's own founding affidavit indicates at "B","C","E" and "F" annexures which refer to Mr. Dlamini as the Board's General Manager. The Association has not put forward any evidence to suggest that Mr. Dlamini is not authorised by his Board to make the affidavit. As a matter of law the annexing of a resolution is not essential, and in the present instance it is not necessary: see Mall (Cape) (Pty)Ltd v. Merino Ko-operasie Bpk 1957 (2) SA 347(C). This objection in limine is rejected.

Three points in limine were in turn taken by the Board, which it is convenient to deal with in the following order.

First, it was argued that the Association has no locus standi in judicio to bring its application because it is not a body corporate and is therefore not a legal person. An unincorporated association may nevertheless sue in its own name : see Rule 14(2) of the Rules of the High Court. That is sufficient for present purposes but an unincorporated association may also sue in its own name if its rules so provide: See Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa Third Edition, page 159.

The Board's General Manager annexed to his affidavit a registered copy of the Constitution of the Association, which does not refer to any power to sue or to be sued. In his replying affidavit, the president of the Association annexed a document which he identified as the constitution as amended. Clause (2) of this document does specify that the Association may sue or be sued. It was objected that the Association had not proved that the amendment had been duly made. Mr. Sibandze has however identified the document on oath as the amended constitution. It is certified as having been registered on 20th August 1991. On its face it appears to be a valid document and in any event, as I say, the rules of court permit an unincorporated association to sue in its own name. This ground of objection fails.

The second objection in limine was that the second and third respondents, who are the Human Settlement Authority and the Attorney General (the latter sued as representative of the Minister), have been wrongly joined. It appears to me in the first instance that both of the second and third respondents may have a direct and substantial interest in the proceedings that the Association seeks to sustain, and further that it is for either of them, rather than the Board, to raise the issue of misjoinder. This ground of objection is therefore also rejected.

The Board's third point in limine is that the Association has no locus standi in judicio because it is apparent that it is suing as an agent on behalf of its principals. The response of the Association to the objection is, first, that the Association is suing in its own right and not as the agent of the Board's tenants and, secondly, that the Board is in any event estopped from denying the Association's authority to act on behalf of the Board's tenants.

This objection in my judgment has substance.

What the Association is seeking in the first instance is to prevent the Board from increasing the rents of persons who are tenants and from locking out or ejecting persons who are tenants. In its own founding affidavit it says that it "represents tenants" who are occupying "various" properties owned by the Board, and further that it - the Association - "has the mandate" to bind "the said tenants". That in the first place is in my view a clear statement that it is acting as the agent of tenants of the Board. It is also vague. It does not specify either that it is acting for all of the Board's tenants or which ones it is acting for. The constitution of the Association does not show that it acts for all of the Board's tenants and it does not show which and how many tenants it acts for.

In Sentrakoop Hondelaars Bpk v. Lourens and Another (1991) 3 SALR 540, a decision of the Witwatersrand Local Division, it was held by Marais J that it was not proper in principle or on the authorities for an agent to sue in his own name on behalf of the principal whom he represents where the claim being enforced is that of the principal and the principal is the true plaintiff. In the course of the judgment, the learned judge reviewed the previous authorities at some length, distinguishing the case where an agent has the right to sue in his own name, i.e. where he is acting for an undisclosed principal. With respect I find the judge's reasoning and conclusions persuasive. In paragraph B and C on page 545 he refers to some of the difficulties that might arise if an agent is permitted to sue in his own name.

In the present case, so far as the first heads of relief are concerned (i.e. against the rent increases or lock out or ejectments) these are prima facie matters of concern to the individual tenants themselves. It is true that one of the assertions in the founding affidavit is that under the National Housing Board Act 1988, the Board has a statutory duty to provide "affordable housing generally in Swaziland", but this in my view underlines in this case the

importance of the need for the right applicant to bring the proceedings in his or its own name. That function of the Board, expressed in section 4(1), is a very wide one. The Act itself does not deal with specific relationships between the Board and its tenants. I would construe section 4(1) as charging the Board, by legislation, with a broad policy objective. There is a great deal of open ground between a general duty to provide, as a matter of statutory policy, affordable housing generally in Swaziland, and the specific situation in which the Board may seek to increase its rental by a given percentage.

It may be - though I express no firm view on it - that a body such as the association could show that it has locus standi in judicio, as an association of a class of persons who have an interest in the policy laid down in the act, to bring proceedings in its own name against the Board, being proceedings intended to challenge the Board's execution of its policy. But then I think it should do so, and say so - in the interests, apart from anything else, of clear definition of the real questions in issue. To take one aspect of the present proceedings by way of example, if the Association overtly sued on that basis, it appears to me that very different considerations might well have applied when deciding whether to give interim relief pending the final outcome of the proceedings. It is one thing for an individual tenant, or a group of tenants suing together to protect their position under their own tenancies, to seek interim interdicts pending the outcome of their applications. It is in my view quite a different situation where an association, as a body of persons with an interest in the scheme of the Act, seeks to challenge the Board's execution of its statutory duties under the Act and, pending the outcome of the proceedings, also seeks interim relief for individual tenants.

The other head of relief, i.e. for a Commission of Enquiry to be established, also to my mind underlines the importance

of insisting that proceedings are brought in the name of the proper party. As far as this head of relief is concerned, I have in any case very strong reservations as to the appropriateness of such relief. I do not think this Court has power to make any such order and I have very strong doubts that it should ever have formed part of the basis on which interim relief was based. Apart from this, however, a Commission of Enquiry is the kind of body which would usually be concerned, in its eventual objectives, with the intended policy of the Act rather than specific tenancies. As I say, I doubt that anyone would be entitled to an order for an enquiry but if that were a possible order, it seems to me that it would be more appropriately sought by an association suing in its own name, as a body having an interest in the policy of the Act, rather than as an agent for individual tenants.

And apart from each of these things, there are practical issues involved in permitting the Association to sue in its own name on behalf of the tenants - notably on whose behalf exactly is the association suing, and to what extent is it authorised to do so?

I do not consider that it can be said that the Board is estopped from denying that the Association represents the Board's tenants. The issue still arises - which tenants? The Association's own pleadings do not make that clear. It cannot in my view be said properly that because the Board was willing to discuss and negotiate the question of rent increases with the Association, or even to refer the matter to the Minister as an arbitrator, it was thereby by its conduct acknowledging the Association's locus standi in judicio to sue the Board in its own name on behalf of the Board's tenants.

In SentraKoop Marais J considered the consequences of the case where an agent incorrectly commences proceedings in his own name on behalf of a principal. He held, for reasons

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that I adopt and follow, that such a situation was not necessarily fatal to the course of the proceedings. A suitable amendment might be allowed.

Here, however, I do not consider that appropriate. The third objection in limine by the Board does in my view succeed. These proceedings should have been commenced at the outset either by the tenants themselves or by the Association in its own right. In the latter event, it would in my view have had to couch the basis for its claims to relief on somewhat different grounds. If it have sued in its own right, I think it is a very moot point indeed as to whether it would have obtained any interim relief at all, pending the outcome of the case. On the papers as they stand, it is not at all apparent that if the other course is pursued (i.e. if the tenants sue in their own names) they can be permitted easily to do so by straightforward amendments. In the meantime, the Association and, through it, tenants who may be its members have had the advantage of the interim interdict.

In the circumstances, I consider that the proper course is to discharge the rule nisi (and thus the interim interdict) with costs to the Board, leaving it to the Association or the tenants to bring further proceedings in their own names respectively, as they may see fit.

I make orders accordingly.

D. Hull

DAVID HULL
CHIEF JUSTICE