IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 876/97

In the matter between:

DUMISA SUGAR CORPORATION Applicant

and

THE ATTORNEY-GENERAL 1st Respondent

MINISTER OF PUBLIC ENTERPRISE 2nd Respondent

and

THE SWAZILAND SUGAR ASSOCIATION Intervening Respondent

Coram: Dunn J.

For the Applicant: Adv. Zeiss

For the 1st & 2nd Respondent: Miss Duma

For the Intervening Respondent: Adv. Flynn

JUDGMENT

19th May 1997

On the 2nd April 1997, the applicant obtained an order from this court in the following terms:-

1. That a rule nisi do issue calling upon the respondents to show cause on the 4th April 1997 why-

(a) the applicant's respresentative and/or attorney should not be allowed to inspect and make copies of the following documents presently in the possesion of the respondents:

(i) letters addressed to the 2nd respondent by the Swaziland Sugar Association dated the 8th and 31st July 1996.

On the 4th April 1997 the Swaziland Sugar Association filed a "Notice of Intention to Intervene and Oppose". Notice was given that an application would be made at the hearing of the application against the Respondents for an order –

Granting the Intervening Respondent herein leave to oppose the application launched by the Applicant.

The Swaziland Sugar Association was cited as an intervening Respondent in the application. Strictly speaking the Association should have been cited as an applicant "in re DUMISA SUGAR

CORPORATION (PTY) LTD vs THE ATTORNEY GENERAL and THE MINISTER OF PUBLIC ENTERPRISE".

When the main application was called on the 4th April the parties therein requested that it be post-poned for argument on the contested roll. In the application to intervene it was ordered that answering affidavits, if any, should be filed by the 8th April 1997 and replying affidavits, in any, by the 10th April 1997. The matter was subsequently post-poned on several occasions until the 2nd May 1997 when it was argued before me.

I have already set out the relief which was sought in the main application. The applicant in that application set out the basis for seeking the relief namely, that the applicant requires the letters referred to in order to enable the Applicant to bring an application against, inter alia, the Swaziland Sugar Association to set aside the implementation of the amendments to Swaziland Sugar Industry Agreement which were published in the Swaziland Government Gazette on the 29th November 1996.

The 1st and 2nd Respondents raised a point in limine namely, that the Swaziland Sugar Association should have been joined as a Respondent in the application. On the merits the 1st and 2nd Respondents indicated that they had no objection to the relief sought.

An Applicant in an application for leave to intervene must satisfy the Court that:

i. He has a direct and substantial interest in the subject matter of the litigation, which could be prejudiced by the judgment of the Court.

ii. The application is made seriously and is not frivolous and that the allegations made by the Applicant constitute a prima facie case or defence -it is not necessary for the Applicant to satisfy the Court that he will succeed in his case or defence.

See MINISTER OF LOCAL GOVERNMENT v SIZWE DEVELOPMENT 1991(1)SA 677 at 678.

A "direct and substantial" interest has been stated as –

"an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation".

It is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court. See UNITED WATCH AND DIAMOND CO v DISA HOTELS 1972(4)SA 409 at 415 and the authorities there cited.

The affidavit in support of the application to intervene consists of some 17 pages. The affidavit sets out in detail, the contents of an application brought by DUMISA SUGAR CORPORATION, DUMISA MBUSI DLAMINI against the ATTORNEY GENERAL

and five others, under Case No. 617/97. The Association has chosen to refer to that application as the "main application". This only serves to confuse matters as the "main application" is that between DUMISA SUGAR CORPORATION (PTY) LTD and the 1st and 2nd Respondents.

Much reference is made in the affidavit to the relief which the Applicant intends seeking upon receipt of the letters of the 8th and 31st July and to the intervening Respondent's right to be joined as a Respondent or Defendant if and when such proceedings are instituted.

The application under Case 617/97 was heard and dismissed by Sapire A C J on the 14th March 1997. An appeal against the dismissal has apparently been filed. No useful purpose would be served by a consideration of the supporting affidavit in so far as it relates to that application, for the simple reason that that application is totally irrelevant to the subject matter of the application against the 1st and 2nd Respondents namely, access to the letters of the 8th and 31st July 1996.

The only portion of the supporting affidavit which deals with the subject matter of the main application is paragraph 7 which is set out as follows –

7.1.1. The letters concerned constitute confidential and privileged correspondence which passed between the 3rd Respondent and the Honourable Minister.

7.1.2. The Applicant is clearly not entitled to such confidential and privileged documentation which passed between the 3rd Respondent and the 2nd Respondent
as it has no locus standi in the matter.....

7.1.3. I humbly submit that the Applicant has not launched the proceedings threatened in the main application (Case No. 617/97) which of necessity would have to be by way of action and as such the Applicant is merely seeking discovery of documentation (which it is in any event not entitled to) prior to such action being instituted.

Estoppel, was advanced by Mr Flynn in his argument as a ground which the Intervening Respondent would rely on in the main application. The argument here was that the Applicant had not taken any steps to deal with certain resolutions taken at a meeting in October 1996 relevant to the procedures that were followed in effecting the amendments to the Sugar Industry Agreement. With respect, this submission is misconceived and confuses the main application with what is stated as being the intended action. The Intervening Respondent will have every opportunity of raising such a defence if and when the intended action is instituted.

The Applicant's short reply to the arguments advanced by the Intervening Respondent is firstly, that the Intervening Respondent has lost control of the originals of the letters of the 8th and 31st July 1996 and that its remedy may probably be by way of an interdict against the 1st and 2nd Respondents.

Secondly, that the Roman Dutch Law only recognises priviledge as between a client and his Legal Advisor. For the latter proposition the Applicant relies on the learned Authors Hoffman and Zeffert, THE SOUTH AFICAN LAW OF EVIDENCE, 4th edition P268 et seq.

I accept as correct the contentions of the Applicant in this regard. The Intervening Respondent's interest in the letters lies in the simple fact that the Intervening Respondent is the author of the letters in question. It is not an interest as defined in the authorities set out earlier in this judgment.

The averment that the Applicant is in essence seeking discovery of documentation prior to institution of an action, is surely not one to be made by the Intervening Respondent. The relief presently sought is not against the Intervening Respondent and the Intervening Respondent can in no way be prejudiced by the judgment, one way or the other, in the main application.

The application to intervene is dismissed.

On the question of costs, both the Applicant and the Intervening Respondent applied for costs on the Attorney and Client scale including the costs of the 1lth, 22nd and 28th April. I'am persuaded that this is an appropriate case in which to award costs on the Attorney and Client scale. The Intervening

Respondent has been unsuccessful and is hereby ordered to pay the costs on that scale. The application that such costs include the costs of the 1lth, 22nd and 28th April is refused. I have no knowledge of what transpired in the application to intervene on the 1lth April. In so far as the 22nd April is concerned, the Registrar should not have allocated that date without first ascertaining whether or not a Judge would be available to hear the matter. The position regarding the 28th April is that the matter was, for reasons beyond the control of the parties, not proceeded with.

B DUNN

JUDGE