IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 3544/97

In the matter between

ELIAS MAHLALELA PLAINTIFF

And

LOVELACE MDLULI

Coram

For Plaintiff

For Defendant

JUDGEMENT

(11/12/98)

Maphalala J:

The issue that came for determination in respect of this matter on the contested motion of the 30th October 1998 was whether or not a certain paragraph should be struck off or not before proceeding with the application for summary judgment.

DEFENDANT

S.B. MAPHALALA - J

MR. T. SIMELANE

MR. SIMELANE

Mr. Simelane from Robinson Bertram and Company argued before the court a notice in terms of Rule 23 (2) has been filed by the defendant to have paragraph 4 of the plaintiff's replying affidavit in the summary judgment proceedings and that further the plaintiff is to pay the costs of suit. To support his arguments he cited the case of Sommerick vs Computronics 1982 - 86 S. L. R. 511 by Hannah CJ and the case of Victor vs Victor 1938 W. L. D 16.

Mr. Simelane from Bheki G. Simelane took the view that there is no application before court for striking out in that what purports to be such an application lack two essential elements namely:

- 1. It does not indicate the offending paragraph;
- 2. The grounds on which the paragraph is offending.

To this effect he referred the court to Herbstein 's Van Winsen The Civil Practice of the Supreme Court of South Africa (4th ED) at page 356 paragraph H where the learned authors stated that within ten days of service upon him of the answering

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affidavit and relevant documents, the applicant may deliver a replying affidavit. In his replying affidavit the applicant may adduce any testimony that is relevant to the issue and that serves to refute the case put up by the respondent in his answering affidavit. He argued further that the application to strike out should be dismissed with costs.

This is the issue before court for determination. The question to be determine is whether or not the notice of application to strike out in terms of Rule 23 (3) by the defendant is properly before court. It is trite law

that applications to strike out are taken by way of motion (see Cyril Smiedt (Pty) Ltd vs Lourens 1966 (1) S.A. 150 (o)). Upon proper notice to the other party, indicating the passages objected to, together with a short statement of the grounds of the objection (see Abromowitz vs J acquest & another 1950 (2) S.A. 247 (w)). In the case in casu in appeals ex facie from defendant's notice to strike out that the former requirement has been met but the latter has not been complied with. The notice reads as follows:

"Be pleased to take notice (sic) will be made to the above honourable court on Friday the 11th September 1998 for the application to be made on behalf of the defendant for an order in the following proceedings:

- a) Striking out paragraph 4 of the plaintiff's replying affidavit in the summary judgement proceedings.
- b) Costs of suit.
- c) Further and/or alternative relief.

The paragraph which is sought to be strike out reads as follows:

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I annex to a copy of my personal cheque that I advanced to the defendant marked E. M. L.".

It has not been shown by the defendant what are the grounds on which the said paragraph is objectionable (as per Ether (Pty) Ltd (supra)). It has not been shown why the defendant is of the view that the said passage is vexations and scandalous and that it introduces new matter (see Vatz vs Law Society of Namibia 1991 (3) S.A. 371). For this reason it is my considered conclusion that the notice falls short in satisfying the requirement of Rule 23 (2) of the High Court Rules.

I thus rule that the application to strike out fails and is therefore dismissed with costs.

S.B. MAPHALALA

JUDGE