

IN THE HIGH COURT OF SWAZILAND

a: Sibusiso

CASE NO. 260/98

IN THE MATTER BETWEEN

SIBUSISO SIMELANE	APPLICANT
VS	
SIBONGILE NXUMALO	1ST RESPONDENT
CHRISTINA VILAKATI	2ND RESPONDENT
SIPHO FAKUDZE	3RD RESPONDENT
CORAM	S.B. MAPHALALA - A J
FOR APPLICANT	MR. MDLADLA
FOR RESPONDENTS	MR. NXUMALO

JUDGEMENT

(30/06/98)

This is an application to strike-out. The respondents are applying for an order in the following terms:

1. That the following paragraphs, passages and annexures be struck out from the applicant's replying affidavit on the grounds that the allegations and facts set out therein;
 - 1.1. constitute new matter which should have appeared in the applicant's founding affidavit; and/or;
 - 1.2. constitute new matter which is irrelevant;
 - 1.3. are calculated to prejudice the respondents and are vexations, namely:

Paragraph 4

 - (a) The whole paragraph

2

a:Sibusiso

Paragraph 5

- (a) The whole paragraph, together with annexure "A"
2. Costs.

The matter came before me for arguments on the contested roll of the 22nd May, 1998. Mr Mdladla opposing the application to strike-out is of the view that the present application is premature in that in

accordance with the law such applications are to be lodged when the matter is heard on the merits and the applicant would be barred to file further answering affidavit. In support of this contention cited the work of Harms on Civil Practice in the Supreme Court Act at page 192 where the learned author stated that application to strike out should be by notice in terms of the rules and should be set down for hearing at the same time as the hearing on the merits prior to such hearing the application will be premature. (See Ether (Pty) Ltd vs Silver 1947 (4) S.A. 173(w).

Mr Nxumalo for the applicant contends that the essence of pleadings is to try and ventilate the issues. The paragraph which are sought to be struck out are paragraphs 4 and 5 and the annexure therein. It is trite law that all allegations should be in the founding affidavit and the other party cannot be allowed to support his case in the replying affidavit. He must stand or fall on his founding affidavit. He must not be allowed to make general statements in his founding affidavit and thereafter seek to put flesh on the skeleton in his replying affidavit to support this view he referred the court to the case of Mazibuko vs Dickie 1963 - 69 S. L. R. 106 and the case of Fairdeal Furnitures vs Dlamini 1982 - 86 S. L. R. 6. Mr Nxumalo went on to attack the various paragraphs which are sought to be strike out. Paragraph 4 of the replying affidavit the other party seeks to introduce and make reference to documents from the Ministry of Education which documents should be in the founding affidavit. There was no document in the founding affidavit to support the allegation that applicant was the Chairman of Gugulethu Pre-School. The same applies to the paragraph which seeks to introduce annexure "A". Annexure "A" should have been part of the founding affidavit. These are the issues the respondent was entitled to respond to but respondents were not given the opportunity to respond. Mr Nxumalo further referred the court to the case of Royal Swaziland Sugar Corporation Limited t/a Union and 9 others Civil Case No. 2959/97 to the view that the court will find cause to strike out offending paragraphs which should have been contained in applicants affidavit. The court is not obliged to adopt what Mr Mdladla is advocating that of ordering his clients to file supplementary affidavits. The court has a discretion. There is no general rule that immediately a notice of application to strike out is lodged the court is to go there and there to the main action.

Mr Mdladla on points of law argued that the mere fact that the other party has filed an affidavit to strike out he is debarred from filing further affidavits (refer the case of Munay vs Munay 1946

3

a: Sibusiso

WLD 280). He argued further that in this case there is no prejudice that the application to strike out should be dismissed with costs.

These are the issues before me. The general rule emerging from decisions in South Africa and in Swaziland is that all necessary allegations must appear in the founding affidavit and that an applicant will not (save in exceptional circumstances) be permitted to make out or supplement his case in a replying affidavit. The applicant must stand or fall by his founding affidavit and the facts alleged therein and I cannot introduce for the first time in his replying affidavit facts or circumstances upon which he seeks to found a new cause of action. In the Royal Swaziland Sugar Corporation Limited case supra Dunn J gave an extensive review of decided cases in South Africa where the aforesaid principle was enunciated. I agree with the learned judge on this case.

Now I turn to the founding affidavit of the applicant. I will concentrate on the offending paragraphs 4 and 5. Paragraph 4 reads as follows:

4

"The third respondent is Siphso Fakudze a swazi male adult of Matsapha who is the Chairman of Nkwalini School committee.

5

On the 19th January 1998 I heard an announcement over the radio to the effect that Gugulethu Pre-School was opened and the registration would be at Nkwalini Primary School. The announcement was being made on behalf of the (third respondent) Siphso Fakudze. I was surprised to hear the announcement as I am the Chairman of the Pre-School committee and if there were any announcements to be made I was to be informed....."

The corresponding paragraphs which are sought to be strike out reads as follows:

4

AD Paragraph 4

"I re-iterate that I am the Chairman of Gugulethu Pre-School. I refer the honourable court to a document which registered the pre-school with the Ministry of Education and was filed with the Ministry of Education after the election in 1991. There has never been any meeting called to re-elect the committee members (my emphasis).

5

4

a: Sibusiso

AD Paragraph 5

" I note that the third respondent admits having made the announcement and aver that he had no authority to do so. The Gugulethu Pre-School is a private school and the people who advised the respondents to make such an announcement over the radio had no authority to do so. I beg leave to refer the court to annexure "A" at page 4 of the Pre-School registration form to the Ministry of Education.

The sections I have underlined in paragraph 4 and 5 seem to me to be the offending sections of the paragraphs which are sought to be strike out. Annexure "A" is titled "Ministry of Education" subtitled "Registration" then nursery schools programme 1994. It then gives the name of the preschool, address, name of organization, name and address of senior person responsible for the nursery school, list of all staff employed with position and qualifications, number of children enrolled with their names and general information which relates to the pre-school including matters of finance, salary of staff, etc.

Having looked at these offending paragraphs I do not see how they can be interpreted as introducing new issues. To me they seem to reply to the answering affidavit of the third respondent Siphso Fakudze and they amply the issues raised in that answering affidavit. I must point out in passing that the answering affidavit I am referring to is referred to by the deponent as a confirmatory affidavit. However, I think it was a mistake on the part of the person who drafted the affidavits. The answering affidavit of Siphso Fakudze raises the following matters as follows:

"3. AD Paragraph 1

I deny that the applicant is the Chairman of the Gugulethu Pre-School, as alleged"

and

"AD Paragraph 5 & 6

I admit having made the announcement after I had been requested to do so by the parents of the children at Gugulethu Pre-School and community. I reiterate that the applicant is not the Chairman of the Pre-School committee by the parents".

a: Sibusiso

To me paragraphs 4 and 5 which are said to offend and thus should be strike out seem to explain the allegations made as shown above and amplify on them. It is trite law that a party in his replying affidavit may address any testimony that is relevant to the issue and that serves to refute the case put up by the respondents in his answering affidavit (see Reiter vs Bieberg and others 1938 SWA 13).

In the result, I dismiss respondents application for striking out with costs.

S.B. MAPHALAIA

ACTING JUDGE