IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 869/98

In the matter between:

DUMISA SUGAR CORPORATION (PTY) LTD	1ST APPLICANT
DUMISA MBUSI DLAMTNI	2ND APPLICANT
and	
SWAZILAND SUGAR ASSOCIATION	1ST RESPONDENT
SWAZILAND CANE GROWERS' ASSOCIATION	2ND RESPONDENT
SWAZILAND SUGAR MILLERS' ASSOCIATION	3RD RESPONDENT
SWAZILAND SUGAR INDUSTRY QUOTA BOARD	4TH RESPONDENT
MINISTER OF ENTERPRISE & EMPLOYMENT	5TH RESPONDENT
ATTORNEY GENERAL	6TH RESPONDENT
CORAM:	MATSEBULA J
FOR THE APPLICANTS:	MR. B.G. SIMELANE
FOR THE RESPONDENTS:	MR. HENWOOD

RULING: APPLICATION IN TERMS OF RULE 35 (20)

The first and second applicants have brought an application to compel first, second, third and fourth respondents to furnish certain documents which were referred to in an answering affidavit filed by the deponent one Petrus Frederick de Beer on behalf of the respondents. The applicants in their notice of application refers to specific paragraphs wherein the said de Beer mentions the documents required by applicants in their application. These are set out in the application and numbered 1-6.

1. Each of the amendments to the SUGAR ACT, the agreement and the documents comprising and embodying such amendments referred to in paragraph 21.2 of de Beers

affidavit.

2. Each of the notices referred to in paragraphs 21.4.1. and 21.4.2. of de Beers affidavit.

3. Each of the Government Gazettes and Notices referred to in paragraphs 21.6.1 to 21.6.7 of the de Beers affidavit.

4. The notices referred to in paragraph 21.7.

5. Each of the amendments to the agreement and documents comprising and embodying such amendments referred to in paragraph 21.8 including the resolution of the meetings of Millers' Association, the Growers Association and Sugar Association in terms of Clause 3 of the Sugar Agreement pertaining to such amendments.

6. The notice referred to in paragraph 35.2.

Rule 35 of the HIGH COURT ACT deals with the subject of discovery, inspection and production of documents and tape recordings. Subsection (2) stipulates the time limit and manner of discovery of the documents under Rule 35.

There is no doubt in my mind that the applicants are within their rights in invoking the provisions of Rule 35(20). The only question that arises for the court is to decide whether or not the applicants are entitled in terms of Rule 35(20) to call upon the respondents to produce the class of documents the applicants are asking the respondents to produce.

Rule 35(20) provides: "Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 16 in the first schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof." It seems quite clear that the applicants are entitled in terms of subsection (2) to call upon the respondents to produce the documents. There is no question about this. What remains to be decided is the class of documents applicants require respondents to produce. Rule 35 does not assist in defining the class of documents a party may and/or may not produce.

The respondents resisted the call by the applicants to produce these documents. This resisting emerges from correspondence handed in by Mr. Simelane during his argument before me. The

first letter dated 11th June 1998 was directed to applicants' attorneys and was in response to a letter which applicants' attorneys had written to respondents' attorneys in terms of Rule 35(20). In that letter the respondents' attorneys informed the applicants' attorneys that they were still liaising with their clients and counsel about the documents required in terms of Rule 35(20). They suggested that the parties should agree that the dies will not run until the applicants receive a letter from them informing them of their attitude towards the request in terms of Rule 35(20).

Another letter handed in by Mr. Simelane dated 18th June 1998 clearly sets out the attitude of the respondents to the notice in terms of Rule 35(2). Paragraph (2) of that letter states that the documents required by the applicants are legal notices published in the Government Gazettes in respect to the amendments to the Sugar Act Agreement. They contend that these are public documents which they, the applicants, can easily lay their hands on.

In paragraph 3 of the letter, respondents' attorneys state they are not obliged to discover publications of the nature of documents requested. However in their paragraph 4 of the letter they say they have nevertheless provided the said documents on entirely without prejudice basis. Paragraph 5 of their letter warns the applicants' attorneys that should they proceed with their application notwithstanding, order for appropriate posts will be sought.

I have already said that Rule 35(20) does not define the class of documents which may and/or may not be produced. Mr. Flynn has referred me to the Statute of Swaziland, Section 41(1) under the heading Gazette evidence in certain cases provides:-

(1) If proof is required for the contents of any law, or of any other matter which has been published in the Gazette, judicial notice shall be taken of such law, or other matter.

(2) Section 41(2) reads as follows; "A copy of the Gazette, or a copy of such law, or any other matter purporting to be printed under the suprentendence or authority of the government printer of Swaziland or of the Republic of South Africa, shall, on its mere production be evidence of the contents of such law, or other matter, as the case may be."

It seems to me therefore, that the class of documents referred to by Mr. de Beer in his affidavit

whose production applicants seek are public documents and cannot be said to be in the possession of the respondents for the purposes of the provisions of an application under Rule 35(20). It follows that the application must fail and is hereby dismissed.

The question of costs is a very sensitive one in contested matters. The courts should not easily grant costs which are of a punitive nature as this would tend to discourage litigants from engaging freely in litigation. However, in cases where a party ought to have realised the risk it was taking in persisting in bringing an application which borders on being of a vexatious nature and therefore abuse of the Rules of Court it only has itself to blame for the costs which follow.

In this matter there was correspondence which drew the applicants attention that the respondents were not obliged to produced the documents, but nevertheless provided them on a without prejudice basis and the applicants went ahead and applied the provisions of Rule 35(20). The court is of the view that costs be granted on an attorney and client scale. The court so grants the costs.

J.M. MATSEBULA

JUDGE