IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.1270/00

In the matter between:

VIF LIMITED	APPLICANT
RE: VIF LIMITED	
VS	
MOSES MATHUNJWA & 10 OTHERS	DEFENDANTS
CORAM:	MATSEBULA J
FOR THE APPLICANT:	MS. VAN DER WALT
FOR THE RESPONDENTS:	MR L. MAZIYA

RULING ON POINTS IN LIMTNE

This is a matter brought under a certificate of urgency which according to the date in the notice of motion should have been heard on 8th May 2000, but it would appear it was infact heard on the 9th May 2000 because that is the date reflected in the court order which issued a rule nisi.

In the notice of motion which is accompanied by a founding affidavit of one Paul Thomas Arnot the applicant prays for the following relief:-

(a) that the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency.

(b) That the applicant's non-compliance with the rules relating to the above said forms and service be condoned.

(c) Pending the finalisation of this application that a rule nisi do issue returnable on a date and time to be determined by this Honourable Court in the following terms-

(1) that the respondents be interdicted and restrained from utilising and/or cultivating and/or erecting structures and/or making water ways on and/or making any structural addition or changes and/or in any unauthorised manner using or interfering with the land described as remainder of Farm 860 Vuvulane, Lubombo Swaziland (hereinafter referred to as the land)

(2) that the respondents be directed to remove any structures, implements, or other things brought by the respondents onto or affixed to the said land, failing which the applicant shall be entitled to remove and dispose of same,

(3) That the respondents be interdicted and restrained from using the communal water supply on any plots allocated to the respondents.

(4) That the respondents be interdicted and restrained impeding the applicant in its utilisation of and control over said land or from causing any interference, obstruction or disturbance on any portion of the said land, including but not limited to any act of violence or any interference with or threats of violence to the employees of the applicant.

(5) That the respondents be directed to pay the applicant's costs.

(d) that the orders (C1 to C4) above operate with immediate effect pending the return date herein.

(e) That the respondents be called upon to show cause on a date and time to be determined by this above Honourable Court as to why the rule nisi should not be confirmed,

(f) That the applicant be directed to serve copies of the application herein and of this order on each respondent.

(g) Such further and/or alternative relief as this above Honourable Court may deem fit.

Further take notice that the founding affidavit of Paul Thomas Arnot together with its supporting annexures will be used in support thereof.

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On the 9th May 2000 the Honourable Chief Justice granted a rule nisi in respect of above prayers and the matter was to be argued on the 17th July 2000. On the 17th July 2000 it was further postponed to 18th July 2000 and on 18th July 2000 it was finally argued before me and I reserved my ruling on the points raised in limine which were raised by the respondents and argued on that day.

I will proceed to deal with those points in limine.

Before the commencement of the arguments on the 18th July 2000 counsel for the applicant raised concerns about the failure of the respondents to have filed their heads of argument on a date which was ordered by the Honourable Chief Justice. Counsel for the respondents on the other hand denied that any such order had been made, and added that the Honourable Chief Justice had raised a query about how one Ndumiso Mamba's affidavit had been filed whose contains dealt with the application when he was a Managing Director of an organisation known as Tibiyo TakaNgwane.

Counsel for applicant denied that such concern was ever raised by the Honourable Chief Justice. As there was no endorsement on the court's file I advised the two counsel to abandon the controversy and rather proceed with the points in limine for the sake of progress.

Mr. Maziya for the respondents, had in his heads of argument first applied that the affidavit filed by one Ndumiso Mamba be struck out as being irrelevant and constituting hearsay evidence as there did not seem to be any connection between Tibiyo TakaNgwane and applicant as Tibiyo TakaNgwane had not been cited as a party to the proceedings.

As the matter of striking out is regulated by the provisions of Rule 23(2) of the Rules of this Court and Rules 23(2) provides as follows:

"Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may within the period allowed for filing any subsequent pleading, apply for the striking of such matter and may set such application down for hearing in terms of Rule 6(4) but the court shall not grant he same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if the application to strike out is not granted."

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From the reading of the provisions of this Rule as a whole it appears to me that one would of necessity, have to consider the merits of the application before one can be in a position to say whether or not a party applying for such striking out will be prejudiced of such application was not granted.

As I had been asked to deal with the points in limine, I suggested to Mr. Maziya that the application for striking out be left until the court was dealing with the merits. However, the application for striking out of Ndumiso Mamba's replying affidavit was an integral part of the challenge by Mr. Maziya of the lack of locus standi of the applicant, in that Mr. Maziya contended that Tibiyo TakaNgwane according to the contents of Mr. Mamba's replying affidavit, had authorised the applicant to perform certain acts.

Mr. Maziya contended that the applicant had not even established whether Tibiyo TakaNgwane itself was an organisation which was capable of suing or being sued. It was Mr. Maziya's submission that, unless that had been clearly established by the applicant, the applicant itself would not be heard to say it had the necessary locus standi in the proceedings. Mr, Maziya further argued that in the founding affidavit of Paul Thomas Arnot he had not even attempted to say anything about Tibiyo TakaNgwane, it was only in the replying affidavit by Mr. Mamba that Tibiyo TakaNgwane was first mentioned. Mr. Maziya stated that an applicant must stand or fall by the contents of its founding affidavit. The court was referred to numerous decided cases on the point (see pages 2 and 3 of the heads of argument. Heads of argument forms part of these proceedings) So that instead of completely ignoring the application to strike out by Mr. Maziya, the court had to partly focus its mind to it as it is, i.e. the application to strike out intricably interwoven with the question of applicant's locus standi which in turn forms part of the respondents' heads of argument.

Mr. Maziya argued very vociferously that applicant was made aware as far back as on the 29th November 1999 when respondents' attorneys wrote a letter to wit VIF3, paragraph 4 thereof states, "Our clients have advised us that they have no dealings with V. I. F. Limited and further advised that they have no reason to report to your offices." (See page 32 of the book of pleadings.) It was Mr. Maziya's submissions that because of the attitude adopted by the respondents' vis-a-vis applicant's

authority, it was incumbent upon it to clearly set out its authority and locus standi in its founding affidavit. This, it dismally failed to do, so submitted Mr. Maziya.

At page 7 of his heads of arguments, Mr. Maziya further deals with applicants' founding affidavit and refers to numerous decided cases demonstrating what the contents of a founding affidavit should set out. I don't propose to name these cases seriatim suffice it that Mr. Maziya's submission is to the effect that if Tibiyo TakaNgwane had authority over the land in question, it too, should have shown clearly what it is, is it a legal persona - capable of suing and being sued, has it authority to delegate its powers to the applicant.

Mr. Maziya also challenged the question of urgency and submitted that the applicant had been dealing with this matter as far back as in August 1999. He submitted that on a number of occasions the matter was referred to Ludzidzini and Tibiyo TakaNgwane had also been advised at some stage - why should the matter suddenly be urgent on 8th May 2000 Mr. Maziya wondered. Mr. Maziya asked that the court should uphold the points in limine and discharge the rule with costs.

Ms. van der Walt has also addressed me in rebuttal of Mr. Maziya's submissions. She urged it upon me to consider the founding affidavit of deponent Arnot as whole and not just paragraphs. It was her submission that once the court has done that it will be clear that applicant has not only been authorised but has also the necessary locus standi. This I have done, I have however excluded the contents of TTN2 for reasons I stated when reference was made to Her Majesty the Indlovukazi. In so far as the reference to the applicant operating under the auspices of Tibiyo, I have encountered the difficulty mentioned by Mr. Maziya in his argument to wit - applicant has not even made an attempt to throw light whether or not this organisation is a legal person or indeed an organisation capable of suing and being sued. All the deponent says is that Tibiyo TakaNgwane is a Swazi organisation established pursuant to a Royal Charter in 1968.

In my view, what applicant sets out in his founding affidavit must not only be the usual and ordinary requirements but also accord with the substance of the law i.e. locus standi, clear right where these are requirements.

It is my considered view that the reliance of the applicant on Tibiyo TakaNgwane to have authorised and empowered it to act under its auspices falls far short of the compliance of the above requirements in as much as Tibiyo itself has not been shown in the applicant's founding affidavit to have those rights i.e. to authorise and empower applicant to do what he claims it did authorise and empower it.

(See in this regards VAN WINSON CILLIERS AND LOOTS - THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4th ED. Where the learned authors dealing with the subject of what the applicant's founding affidavit must contain. (See also ERASMUS SUPERIOR COURT PRACTICE B37-38) where the author states inter alia, that the applicant must set out his right to apply that is locus standi.

The remedy sought by the applicant and in respect of which a rule nisi was granted when it first moved its applicant ex parte is a final interdict. The requirements for a final interdict are clearly set out by the C - B PREST - INTERLOCUTORY INTERDICTS AT PAGE 46 and these are:-

(1) Clear right i.e. a definite right.

(2) Act of interference.

(3) No other remedy available to applicant.

The learned author goes further and states that a final interdict unlike an interim interdict which does not involve a final determination of rights of the parties a final interdict is an order to secure a permanent cessation of an unlawful course of conduct or state of affairs (see APPLEM VS MNISTER OF LAW AND ORDER AND OTHERS 1989(1) SA 195 (A) @201B)) and other cases there.

For the court to grant a final interdict all the three requisites mentioned above must be present (see SETLOGELO VS SETLOGELO 1914AD AT 221) and the further cases cited there.

There is mention of the Ludzidzini Royal Residence where the applicant on some occasion went and reported the matter. It is therefore my considered view that the applicant has not complied with all the requisites in order that this court can grant it a final interdict.

In the result, the points in limine are upheld and the rule granted by this court on 9th May 2000 is hereby discharged with costs.

J.M. MATSEBULA

JUDGE