



THE HIGH COURT OF SWAZILAND

SWAZILAND INTERNATIONAL IRRIGATION PROPRIETARY LIMITED

Plaintiff

And

CHAIRMAN OF SIVUKILE FARMERS ASSOCIATION

1st Defendant

SIVUKILE FARMERS ASSOCIATION

2nd Defendant

SWAZILAND KOMATI PROJECT ENTERPRISE LIMITED

3rd Defendant

HERMAN BOSUA & ASSOCIATION

4th Defendant

Civil Case No. 876/2003

Coram	S.B. MAPHALALA – J
For the Applicant	MR. T.R. MASEKO
For the 1 st and 2 nd Respondents	MR. D. MAZIBUKO
For the 3 rd Respondent	MR. MAGAGULA
For the 4 th Respondent	MR. T.L. DLAMINI

RULING ON APPLICATION FOR AMENDMENT

(22/05/2003)

Before court is an application for amendment of a notice of motion and some portions of the founding affidavit. The application is for an order in the following terms:

1. Waiving the normal requirements prescribed by the Rules of this Honourable Court regarding time limits and forms of service and hearing this matter urgently.
2. That an interim order be hereby made calling upon the Respondents jointly and severally to show cause, if any on a date and time to be determined by this Honourable Court why:
 - 2.1 The tender awarded to the 4th Respondents by the 1st and 2nd Respondents by letter dated the 1st April 2003 should not be set aside and declared null and void and of no force and effect.
 - 2.2 That the 1st and 2nd Respondents be interdicted and restrained from making any payments to the 4th Respondent pursuant to the award of the tender pending final determination of these proceedings.
 - 2.3 That the 4th Respondent be interdicted and restrained from continuing with the work for phase 2 on the 75 hectares of land for the installation of a semi-permanent irrigation system pending final determination of these proceedings
3. That paragraph 2.1 to 2.3 above operate as an Interim Order to operate with immediate effect pending the return date.
4. Costs of the application in the event that it is opposed.
5. Further and/or alternative relief.

The application is opposed by all the Respondents in this case. I heard arguments for and against the granting of the application for amendment.

Mr. Maseko on behalf of the Applicant contended that an amendment is a matter that is entirely the court's discretion. The deciding principle is whether or not the other party will not be prejudiced by such amendment, and that such amendments cannot be cured by an order as to costs or postponements. To support this proposition the court's attention was drawn to the works of Harms LTC "*Civil Procedure in the Supreme Court of South Africa*" (1990) at page 293; *Herbstein et al, The Civil Practice of the Supreme Court of South Africa* (4th ED) page 521 at 522 and the case of *Magalela Ngwenya vs The Ministry of Agriculture and Cooperatives and another Civil Case No. 279/2001 (unreported)*.

Mr. Maseko contended further that no prejudice will be suffered by the Respondents should the court grant the amendment. If the court deems it appropriate, it can award costs of the amendment to the Respondents.

The Respondents' opposition was spearheaded by the arguments made by *Mr. Mazibuko* for the 1st and 2nd Respondents. *Mr. Magagula* for the 3rd Respondent and *Mr. Dlamini* for the 4th Respondent aligned themselves with the arguments advanced by *Mr. Mazibuko* except for accentuating some aspects of his arguments. For purposes of this judgment I shall reflect what *Mr. Mazibuko* submitted not to say that I have not considered what the others have submitted. I have considered their points as well.

The gravamen of the Respondents' opposition is that as the Applicant seeks to amend its founding affidavit by deleting certain allegations therein and substituting them with the amended allegation an affidavit being a sworn statement made under oath is incapable of being amended. A proposed amendment renders the original affidavit inadmissible. *Mr. Mazibuko* argued that the purported amendment would offend against Rule 28 (1) of the High Court rules which provides as follows:

“i) any party desiring to amend any pleading or documents **other than an affidavit**, filed in connection with any proceedings, may give notice to all other parties to the proceedings of his intention so to amend (my emphasis).

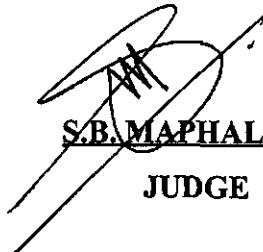
The court was further directed to the work of *Herbstein (supra)* at page 514 where the learned authors state that under the rules it is possible to amend a pleading or document, **other than an affidavit**, without the necessity of obtaining the prior leave of the court. *Mr. Mazibuko* went further to show to the court various paragraphs in the Applicant's founding affidavit which seeks for the amendment, viz paragraph 21 and paragraph 26.3.

I have considered this matter very carefully and it would appear to me that the Respondents' are correct in their assertion that this cannot be done in terms of Rule 28 (1). It would also appear to me that the case of *Magalela Ngwenya (supra)* is

distinguishable from the case in *casu* as in that case the amendment of the notice of motion was in issue not the founding affidavit as in the instant case. In the present case clearly the Applicant seeks to amend even the founding affidavit itself. The amendment being sought would do violence to the Rule which expressly prohibits amendment on affidavits.

It would also appear to me that the most logical course open to the Applicant in the present case is to withdraw the present application and issue fresh papers and thereafter the matter to run its normal course.

In the result, application for amendment is refused and costs to follow the event.



S.B. MAPHALALA
JUDGE