THE HIGH COURT OF SWAZILAND

AYANDZA EMADVODZA FARMERS ASSOCIATION LIMITED

Applicant

And

MAJALIMANE MVILA

1st Respondent

MTSAKATSI MAZIYA

2nd Respondent

HUDUKANE MASANGO

3rd Respondent

MANIKINA MASANGO

4th Respondent

NGOLOTANE MVILA

5th Respondent

REUBEN MATSABA

6th Respondent

Civil Case No. 67/2003

Coram	S.B. MAPHALALA – J
For the Applicant	MR. MAGAGULA
For the Respondent	MR. C. NTIWANE

RULING

(On point *in limine*)

(14/02/2003)

This matter came under a certificate of urgency for an order in the following terms:

1. Dispensing with the normal and usual requirements of the rules of the above Honourable Court and permitting this application to be heard as one of urgency in terms of Rule 6 (25) (a) of the Rules of the above Honourable Court.

2. That a rule nisi returnable on a date to be fixed by the above Honourable Court do hereby issue calling upon the Respondent to show cause why:

   2.1 The Respondents should not be interdicted and restrained from blocking and/or preventing easy access for members of the Applicant's Cooperative in and out of Applicant's field at Sidvwashini in the District of Hhohho.

3. The Respondents should not be ordered to remove barbed with that has been erected on the Applicant's fields as reflected in the diagram enclosed in the supporting affidavit hereto marked "AE1".

4. Show cause why the Respondents should not be ordered to restore the Applicant's fence that they illegally removed and/or destroyed at the Applicant's premises situated at Sidvwashini in the district of Hhohho and that an order should be issued interdicting them from interfering and/or further removing the aforesaid fence.

5. The Respondent should not be ordered to pay the costs of this application.

6. That orders 2.1 to 5 operate forthwith as an interim relief pending the return date.

7. Further and/or alternative relief.

The founding affidavit of the Chairman of the Applicant one Musa Sifundza with annexures is filed in support thereto.

The Respondents opposes the application and the answering affidavits of the Respondents are filed in opposition thereto. In the answering affidavit of the 1st Respondent Majalimane Mvila a point of law *in limine* is raised. The point is raised as follows:

> "3. *In limine*, I am advised and I verily believe the application is defective and ought to be dismissed with costs for the reasons set out below.
>
> 3.1 It does not appear in the founding affidavit that Applicant has *locus standi in judicio* and it can sue and be sued in its own name".

When the matter came before me on the 5th *instant* the above point was argued where counsel filed very comprehensive Heads of Argument for which I am most grateful.

The Respondents attack is directed at paragraph 3 of the Applicant's founding affidavit that the said paragraph, so the argument goes, does not show that the Applicant has *locus standi in judicio* and that it can be sue and be sued in its own name.

Paragraph 3 reads as follows:

> "The Applicant is Ayandza Emadvodza Farmers Association Limited an association duly formed in accordance with the Laws of the Kingdom of Swaziland, carrying on its farming operations at Nyakatfo in the Hhohho District".

The essence of the arguments advanced by *Mr. Ntiwane* for the Respondent is that the fact that Applicant might have been formed according to the Laws of Swaziland does not give it juristic personality or that it is a *universitas* according to our common law. That *in casu* it ought to have been stated in the founding affidavit that the association was capable of suing and being sued in its own name. And had juristic personality to such an extent that it could own or acquire immovable in its own name.

Mr. Ntiwane referred the court to a number of South African cases (see ***Malebjoe vs Bantu Methodist Church of South Africa 1957 (4) S.A. 465*** at ***466 F; Morison vs Standard Building Society 1932 AD 229;*** *Ex parte* ***Doornfontein Judiths Paarl Rate payers Association 1947 (1) S.A. 477*** and ***Aail vs Muslim Judicial Council 1983 (4) S.A. 855*** at ***860*** a***t 861).***

Mr. Ntiwane further argued that the Applicant cannot seek to cure the defect in the replying affidavit by attaching annexure "A1" thereto. To support this view he cited the Appeal Court case in ***VIF Limited vs Vuvulane Irrigation Farmers Association (Public) Company (Pty)***

Ltd Case No. 30/2000 (unreported) at page ***8*** and the authorities cited therein where Tebbutt JA stated as follows; and I quote:

> "It is well established that an Applicant must make the appropriate allegation in its launching or founding affidavit to establish its *locus standi* to bring an application…"

Mr. Ntiwane further contended that even if the court were to be permitted to have regard to annexure "A1" then Applicant's problems would be compounded from the reading of the certificate of collation. According to *Mr. Ntiwane* this document does not advance the Applicant's case any further.

Mr. Magagula for the Applicant argued *per contra*. The thrust of his opposition is that according to the rules, particularly Rule 6 it is not a pre-requisite that the Applicant must specifically aver in its founding affidavit that it has *locus standi*. Paragraph 3 of the Applicant's affidavit, according to *Mr. Magagula* has sufficiently described itself as an association duly formed in accordance with the laws of the Kingdom of Swaziland, which automatically means that it is a legal person. What more is expected of the Applicant – asked *Mr. Magagula*. He also referred the court to the writing of ***Herbstein et al*** *(supra)* at page ***155.***

Mr. *Magagula* further submitted that a *universitas is* a legal fiction, an aggregation of individuals forming a personal or entity having the capacity of acquiring rights and incurring obligations to a great extent as a human being. He cited the case of ***Morrison vs Swaziland Building Society 1932 AD 229*** where it stated that where an association is a *universitas personerum*, it has full legal capacity and any action may be brought in the name of the association.

These are the arguments advanced by counsel for and against the point of law *in limine*. ***Herbstei***n *(supra)* at page ***129*** opens the discussion on this subject with these apt words: and I quote;

> "Before one cites a party in summons or in applications proceedings, it is important to consider whether the party has legal capacity to sue or be sued (*legitima persona standi in judicio)* and ascertain what the correct citation of the party is".

The learned authors proceed and state that the rules make no specific provision for the description of parties in application as they do in respect of action proceedings in Rule 17 (4). Rule 6 (2) simply provides that when relief is claimed against any person, or when it is necessary or proper to give any person notice of an application, the notice of motion shall be addressed both to the Registrar and to that person. It has been held that this Rule must be viewed as a provision complete in itself, for the purposes of which *locus standi in judicio* will be presumed when the parties are **natural persons and there is nothing to indicate a lack of legal capacity**. The learned authors are of the view that this decision seems, however, to overlook the fact that civil summons is defined as including a notice of motion and that the provisions of Rule 17 (4) may therefore be applicable to the citation of parties in application proceedings. The learned authors further submit that parties should be cited in the same way as for actions.

This appears to me to be the proper approach to adopt in application proceedings. Citation as provided for by Rules 6 (2) and 17 (4) cannot be replaced by notification to a group or to persons in general so as to bring a number of faceless Respondents into the proceedings. Further, the words of Tebbutt JA in the case ***VIF Limited vs Vuvulane Irrigation Farmers Association (Public) Company – Appeal Case No. 30/2000 (unreported)*** at page ***8*** are apposite. The learned Judge stated the following at page 8: and I quote;

> "It is well established that an Applicant must make the appropriate allegations in its launching or founding affidavit to establish its *locus standi* to bring an application and not in the replying affidavits".

In the present case the Applicant has dismally failed to establish its *locus standi* on the founding affidavit as required by the law. The fact that Applicant might have been formed according to the Laws of Swaziland does not give it juristic personality or that it has a *universitas* according to our common law. The paragraph is couched in such general terms that it is not clear under which law the Applicant is constituted and thus would have *loci standi* to sue or be sued. In this regard I agree entirely with the submission advanced by *Mr. Ntiwane.*

As further proof that Applicant has not established at paragraph 3 *locus standi* sufficiently the Applicant sought to cure this defect in its replying papers. This in law is not permissible and the *dicta* by Tebbutt JA in **VIF Limited case** *(supra)* is quite clear in this regard.

Legal practitioners should not expect to get sympathy from the court for shoddy draftsmanship.

For the above reasons I uphold the point of law *in limine* with costs.

It is still open to the Applicant to re-launch its application on fresh papers.

S.B. MAPHALALA

JUDGE