HELD IN MBABANE **CASE NO. 384/04**

In the matter between :

VOLTEX (PTY) LIMITED **APPLICANT**

VERSUS

THE CHIEF EXECUTIVE OFFICER OF

SWAZILAND ELECTRICITY BOARD **Ist RESPONDENT**

THE SWAZILAND ELECTRICITY BOARD **2nd RESPONDENT**

THE MINISTER IN CHARGE OF THE SECOND RESPONDENT AS PROVIDED FOR IN THE PUBLIC ENTERPIRSES (CONTROL AND MONITORING) ACT

8 OF 1989 **3RD RESPONDENT**

ATTORNEY GENERAL **4th RESPONDENT**

CORAM **SHABANGU AJ**

FOR APPLICANT **MR. D. SMITH**

FOR RESPONDENT **MR. WISE**

JUDGEMENT 18th

October, 2004

The applicant, Voltex (pry) Ltd commenced proceeding on 7th July, 2004 by way of an urgent application seeking an order that;

> *"1. That the normal rules pertaining to applications be dispensed with and that the matter be enrolled as one of urgency.*

2. *That an order be granted in terms of prayers six and seven of the original notice of motion.*

3. *The First Respondent, being the Acting Chief Executive officer of the second respondent, the Board Members of the second respondent and the third respondent be committed to jail for contempt of the above honourable court's Court order of 12th February, 2004for such period as the above Honourable Court may deem appropriate under the circumstances, alternatively that their committal to jail be suspended subject to the terms and conditions as the above Honourable Court may deem appropriate under the circumstances, further alternatively that the parties herein referred to each be fined with a fine as the above Honourable court may deem appropriate, such fine to be paid forthwith, alternatively be suspended subject to terms and conditions as the above Honourable Court may impose.*

> *4.The second respondent be ordered to comply with the provisions of section 2 of Appendix "B" of the "contract to Establish a Consignment store and to supply materials to the Swaziland Electricity Board" and more specifically clause 2.1 thereof, within two weeks of the granting of this order.*
>
> *5. The first, second and third respondents jointly and severally be ordered to pay costs of the re-enrolment of this application, such costs to include the additional notice of motion and affidavit."*

In paragraph two of the Notice of motion in the present proceedings the applicant prays that an order be granted in terms of "prayers six and seven the original notice of motion." By the original notice of motion the applicant is referring to an earlier application which it fded against the same respondents on 10th February, 2004. That earlier application was also brought on a certificate of urgency and was enrolled for hearing on 12th February, 2004 at 10.00 hrs. That application gave the respondents less than three days to respond to it and to decide whether to oppose same or not. Nevertheless when the matter was called on 12th February, 2004 no opposing papers had been filed by the respondents. The respondents apparently consented to an order that;

> *"(1) The first and second respondents are directed forthwith to pay the Applicant an amount of E3 Million being in respect of the cheque already processed forpayment to the Applicant and which was to be given to the applicant on Monday 2" February, 2004.*

4. *The first and second respondent are directed forthwith to pay to the Applicant the balance of the monies owing to the Applicant, namely E7, 599,273-53 within 7 (seven) days of granting of this order.*

5. *The first, second and third Respondent are directed forthwith to perform specifically in terms of the following contracts entered into with the Applicant, namely :-*

3.1 Phase 2 rural electrification project contract.

3.2 The contract to establish a consignment store and to supply materials to the Swaziland Electricity Board.

4. The application in respect of prayers 4.3, 5,6 and 7 of the notice of motion is postponed sine die"

Prayers 6 and 7 of the original notice of motion were for relief as follows;

"6. The second Respondent be interdicted from acquiring any equipment and material from any other supplier in conflict with the contracts entered into with the Applicant.

7. The second respondent to pay the costs of this application on the scale as between attorney and own client inclusive of the costs of counsel, such costs to be paid jointly and severally with the third respondent in the event of the third respondent opposing this application."

The relief sought under paragraphs six and seven of the "original" notice of motion dated 9th February, 2004 and consequently sought under paragraph two of the Notice of motion dated 7th July, 2004 is that the second respondent, that is, the Swaziland Electricity Board "be interdicted from acquiring any equipment and material from any other supplier in conflict with the contracts entered into with the applicant plus costs of the application filed on 10th February, 2004. Paragraph three of the latter notice of motion dated 7th July, 2004 seeks the committal to jail of the first respondent and the members of the second respondents board for contempt of court, alternatively that any order for committal of the aforementioned persons be suspended subject to such terms and conditions as this court may determine or that the persons against whom such relief is sought be fined or that such fine be also suspended upon terms and conditions determined by the court. As already observed prayer four of the second respondent is for different relief which is namely, that the second respondent complies with the provisions of section 2 of Appendix "B" of the Contract to Establish a Consignment Store and to supply

materials to the Swaziland Electricity Board and more specifically clause 2.1 within two weeks of the granting of the order. The last prayer sought in the notice of motion dated 7th July, 2004 is for the cost of the re-enrolment of the application including costs of the additional notice of motion and affidavit which costs are also claimed against the first, second and third respondents jointly and severally.

The respondents have taken a number of objections to the notice of motion dated 7th July, 2004 and the supplementary affidavit annexed thereto. It is convenient to deal first with the objection raised by way of an application in terms of rule 30. The basis of the objection as stated in the Notice of application in terms of rule 30, is, first, that the supplementary affidavit irregularly seeks to amplify the founding affidavit without the applicant having been granted leave by the court. The objection is that because no leave has been sought and granted for the filing of the supplementary affidavit in support of the relief sought in the notice of motion dated 7th July, 2004 the whole supplementary affidavit should be set aside. As formulated the objection is not directed at specific paragraphs of the supplementary affidavit. Whereas it appears to be fairly settled that leave must be sought and obtained where a party wishes to file an additional affidavit which is both late and out of its ordinary sequence, this requirement is not necessarily applicable where the additional affidavits are tendered before the other party has replied to the main set of affidavits filed by the party tendering the additional supplementary affidavit. Herbstein and Van Winsen, after discussing how the court may exercise its discretion whether to grant leave, where the affidavit or evidence tendered is out of the ordinary sequence in relation to the three sets of affidavits which are allowed in practice put the matter as follows;

> *"If a party to an application files and serves certain affidavits and before the other party has replied to them he fdes additional affidavits, because he did not have time to complete all of his affidavits before a fixed time or because new matter has been discovered or for any other good reason, a court will not reject the additional affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits. It there is an explanation that negatives mala fides or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed. But there must a proper and satisfactory explanation as to why it was not done earlier and, what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs." (See*

HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE SUPREME - COURT OF SOUTH AFRICAN 4™ edition, page 361)

Similarly MORRIS makes the observation as follows;

> *"The number of sets of affidavits allowed in application proceedings is normally three, but the court has a discretion whether to allow further sets of affidavits... to know what constitutes a 'set of affidavits' you might refer to a judgement of WILLIAMSON J where it was held to be permissible to file additional affidavits setting out facts discovered after the original affidavits had been filed but before the opponent had replied to them. Such additional affidavits, in proper cases, would be regarded as part of the original set. "Mv emphasis. See MORRIS, TECHNIQUE IN LITIGATION, 5™ EDITIO, BYH. DANIELS at page 297. (See also TRANSVAAL RACING CLUB V. JOCKEY CLUB OF SOUTH AFRICA 1958 (3) SA 599 (W).*

Even though rule 30 of the rules of this court provides that the court may set aside an irregular proceeding it is also clear that the rule allows the court to make such order as to it seems meet. The court therefore has a discretion whether or not to set aside an irregular step. HERBSTEIN AND VAN WINSEN *supra* state the following regarding the court's approach;

> *"It is clear that the court has a discretion whether or not to grant the application even if the irregularity is established. The attitude generally adopted by the court is that it is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side. In fact, it has been held that prejudice is a prerequisite to success in an application in terms of rule 30. As was said by SHREINER J.A. in TRANS-AFRICAN INSURANCE CO LTD V. MALULEKA, 1956 (2) SA 273(A) @ 278 F-G, 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.' The application may be dismissed with costs if no prejudice was caused by the irregularity. The court may condone the irregularity or allow the party in default an opportunity to cure the defect. The courts' general discretion to condone stems from rule 27 (3) and from rule 30 (3). Condonation should not unfairly prejudice the party who applied for the irregular proceeding to be set aside."*

In the present matter it is significant that the notice of motion dated 7th July, 2004 together with its accompanying affidavit, (i.e. the supplementary affidavit) seeks additional relief from what was initially sought in the notice of motion filed on 10[1] February, 2004. The prayer for the committal of the first respondent and members of the second respondents' board for contempt of court appears to be the main reason for the need to include new evidence in a supplementary affidavit. The respondents had not filed any opposing papers or replied to the original set of affidavits which formed part of the

papers filed on 10th February, 2004. I cannot see what prejudice the respondents are likely to suffer as a result of the filing of the supplementary affidavit. Indeed they have not sought to demonstrate what prejudice, if any, they are likely to suffer. In the circumstances I am not persuaded that there is sufficient reason for setting aside the supplementary affidavit. Similarly in so far as the notice of motion, particularly prayer three thereof, the appropriate order in the case of nonjoinder is not to dismiss or set aside the proceedings, but the court may make such order as may be appropriate to ensure the joinder of the persons interested in the subject matter of the dispute and whose rights may be affected by the judgement of the court, are before court. (See ISAACS, BECK'S THEORY AND PRINCIPLES OF PLEADING IN CIVIL ACTIONS 5th **edition. Para 13. Page** 24) Indeed counsel for the applicant has asked that the application for committal for contempt of court of the first respondent and of the members of the board be served individually and personally on the first respondent and on the individual members of the second respondent's board.

The other objection taken by the respondents to the present application is by way of an application to strike out dated 23rd of July, 2004 and reads;

> *"Kindly take notice that at the commencement of the hearing of this matter the first respondent and second respondents move this Honourable Court to strike out all passages in the supplementary affidavit of the applicant that are hearsay and or new matter and or bald allegations (i.e. a conclusion of law or a conclusion of fact) unsupported by the necessary the underlying facts."*

As formulated the application to strike out is inappropriate and misconceived. An application to strike out is required to specifically identify the paragraphs in the supplementary affidavit which the applicant wishes to have struck out. A notice or application which simply refers to such passages in general terms is not appropriate. It is correct to say that an application to strike out is an interlocutary proceeding as contemplated by rule 6 (24) of the rules of this court and that in terms of the rule such applications should be brought on notice. However, as HERBSTEIN AND VAN WINSEN **in** THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4th **edition at page** 502 "the notice of intention to make the application should

indicate precisely the passages objected to and state briefly the grounds of objection. The applicant must direct the courts' attention to the allegations objected to and not expect it to work through a mass of material in order to discover what matter is irrelevant." Furthermore in terms of rule 6 (28) of the rules of this court, the court shall not grant the application to strike out unless it is satisfied that the applicant will be prejudiced in his case if it is not granted. On this basis the application to strike out cannot be acceded to.

The other objection taken by the respondents against the application dated 7th July, 2004 is that there are no grounds for urgency in bringing the present application. Indeed it is correct that the notice of motion dated 7th July, 2004 is accompanied by a certificate of urgency. The applicant sets out in paragraph seven of the supplementary affidavit the basis upon which it claims that the matter is urgent. In my judgement the reinstatement of the matter on the roll for hearing does not require the applicant to satisfy the requirements of rule 6(25). The effect of rule 6(25) of the rules of this court is to provide and require an applicant who is bringing an application on an urgent basis to set forth in his affidavit explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. This requirement does not apply to the request to have a matter which had been postponed sine die on a previous occasion reinstated or set down on the court's roll of another day for hearing. The applicant's abovementioned notice of motion dated 7th July, 2004 seeks in paragraph one thereof an order that "the normal rules pertaining to applications be dispensed with and that this matter be enrolled as one of urgency." In the next paragraph an order is sought in terms of the original notice of motion dated 9th February, 2004. Paragraph five of the notice of motion dated 7th July, 2004 merely seeks costs of the re-enrolment of the original application. It is only prayers three and four of the latter notice of motion which may be said to be seeking additional relief which was not contained in the original notice of motion dated 9th February, 2004. Prayer three may be said to be an addition of further prayers to the notice of motion of 9th February, 2004 in light of new facts which may be said to have come to light after the original application was filed. It seems to me that prayer four is not substantially different in what it seeks from prayer six of the earlier notice of motion. It may well be that the two

prayers could have been formulated in clearer and better language but I do not intend to express a definite opinion on this at this stage of the proceedings wherein I am only dealing with the objection that there is no basis for hearing the matter on the basis of urgency. Having made the above observations it is clear that some prayers of the original notice of motion were postponed ***sine die*** by agreement of the parties. The court approved that agreement by making it an order of court. Implicit in the postponement ***sine die*** of the original application is the fact that the application could again be set down for hearing on a much shorter notice than that which the latter notice of motion dated 7th July, 2004 gives to the respondents. The notice setting down the application in itself is not necessarily a new application which would require that a certificate of urgency accompanies it. Logically the statement setting forth the grounds for urgency and the reasons as to why the applicant cannot be afforded redress in due course, was unnecessary. The application embodied in the notice of motion dated 7th July, 2004 is in my judgement an interlocutary application in the sense that it is incidental to pending proceedings. The respondent cannot even complain of prejudice as a result of the method employed by the applicant in re-enrolling the application of 9th February, 2004. In the circumstances the objection that there is no basis demonstrated for the urgency claimed by the applicant is not appropriately raised.

On the basis of the aforegoing the respondents' objections in limine are dismissed. The costs thereof shall be costs in the cause.

The applicant is further ordered should it desire to proceed with its application in terms of prayer three of the notice of motion dated 7th July, 2004 to;

6. Serve the application for contempt personally on the members of the Board of the second respondent and on the third respondent.

7. The respondents are to file their answering affidavits, if any within seven (7) days of the service of the application and of this order upon the third respondent and the members of the board of the second respondent.

8. **The applicant is to file its replying affidavit if any within seven (7) days of receipt of respondents' answering affidavit.**

9. **On filing of all papers referred to above leave is granted to any of the parties to enroll the matter for hearing on ten days notice.**

ALEX S. SHABANGU
ACTING JUDGE