THE HIGH COURT OF SWAZILAND

SWAZILAND GOVERNMENT

Applicant

And

P.N.M. AGENCIES (PTY) LTD

1st Respondent

MASWAZI SIBANDZE N.O.

2nd Respondent

Civil Case No. 534/2005

S.B. MAPHALALA - J

MISS K. SIKHONDZE

MR. S. MDLADLA

Coram

For the Applicant For 1st Respondent

RULING

(On points of law *in limine)* **(23/02/2005)**

[1] The Applicant has moved an urgent application for an order, *inter alia,* that execution of the order of this court issued on the 9th July 2004, under Case No. 1850/2004 be stayed pending finalisation of this application; that the attachment of government property effected by the 2nd Respondent pursuant to an order of this court

issued on the 9th July 2004, under Case No. 1850/2004 be set aside; directing the Respondents herein to return all the movable property attached by the 2nd Respondent at St Mark's Primary School on the 9th February 2005 back to the school; and costs

[2] The Founding affidavit of the former Head teacher of St Mark's Primary School is attached thereto. Various annexures are also attached.

[3] The Respondents have raised points of law in terms of Rule 6 (12) (c) as follows:

a) **The application has no Applicant, as the affidavit does not disclose who the Applicant is. It is fatally defective and should be set aside.**

b) **St Mark's Primary School has not been cited as a party.**

c) **The Applicant seeks a final order and has not applied for a *rule nisi.***

d) **The Applicant seeks for a stay which is prohibitory interdict in its nature. It has not outlined the requirements of an interdict. It has failed to take the court in its confidence.**

[4] I heard arguments on the 18th February 2005, and reserved my ruling to today. I shall proceed to address the issues *ad seriatim* as they appear in the Respondent's Notice in terms of Rule 6 (12) (c), thusly:

a) Applicant not cited.

[5] The contention by the Respondents is that the Application has no Applicant, as the affidavit does not disclose who the Applicant is. Therefore, it is fatally defective and should be set aside. I agree with the Respondents in this regard, that the application is fatally defective for lack of particularity. According to the authors ***Herbstein** et al, **The Civil Practice of the Supreme Court of South Africa, 4th Edition*** at page ***361*** the supporting affidavits attached to a Notice of Motion must contain certain averments. Thus, it is essential to state the following clearly: (a) **who the Applicant is, and his right to apply** (see also the cases cited thereat). In the instant case this essential averment is conspicuously absent and therefore the affidavit is liable to be set aside on this ground.

(b) **A necessary party has not been cited.**

[6] It is contended for the Respondents that a necessary party being St Mark's Primary has not been cited as a party.

[7] It is a trite principle of the law that if a third party has, or may have, a direct and substantial interest in any order the court might make in the proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his rights to be joined (see ***Amalgamated Engineering Union vs Minister of Labour 1949 (3) S.A. 637 (A)*** and the other cases cited at folio 42 in ***Herbstein*** *et al* page ***170).*** In the present case it was submitted on behalf of the Applicant that St Mark's Primary School is not a juristic person and thus not capable of suing or being sued and I accept this argument. The fact that the school has dealt with lawyers in the past as shown by the correspondence filed by *Mr. Mdladla* does not make it a juristic personality. Any joinder of St Mark's Primary School can only be a joinder of convenience. Therefore, I hold that this point of law cannot succeed.

(c) and (d) Requirements of an interdict.

[8] For convenience, I shall address points (c) and (d) together as they both involve interdicts and their requirements in law. On point (c) it appears that the Respondents are correct that it is an anomaly for the Applicant to seek for a final order without applying for a *rule nisi.* The Notice of Motion is defective in this regard.

[9] Coming to point (d) *viz* requirements of an interdict. The Respondents contend that Applicant has not outlined the requirements of an interdict. In order to succeed in obtaining a final interdict whether it be prohibitory or mandatory an Applicant must establish:

a) A clear right.

b) An injury actually committed or reasonably apprehended; and

a) Absence of a similar protection by any other remedy (see ***Setlogelo vs Setlogelo 1914 A.D. 221*** at ***227).***

[10] In the present case as it has been shown above under (a) Applicant has not shown its right to apply on the papers and thus has not shown a clear right for a prohibitory interdict and therefore cannot succeed on the papers as they stand.

e) **Urgency.**

[11] A further point was raised from the bar that Applicant has not met the peremptory requirements of Rule 6 (25) (a) and (b) as to urgency. In this regard I was referred to the case of ***Humphrey H. Henwood vs Maloma Colliery and another, Civil Case No. 1623/93.***

[12] In *casu* paragraph 9 of the Founding affidavit seeks to establish urgency as follows:

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"The application is urgent for the reason that execution is already in progress and the Respondents have since removed school furniture from the school. The 2nd Respondent may sell these items at any time and the school shall thereby suffer irreparable harm.

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The Applicant cannot be afforded a hearing in due course because if normal procedure is followed the items in question may be sold by the time the application is heard".

[13] In my assessment of the above paragraph *vis a vis* the provisions of the rule the Applicant has not proved sub-rule (b) of the rule as Applicant may be afforded substantial redress in due course in the form of damages. The general rule is that the courts will not grant an interdict if the Applicant can be adequately compensated for the injury complained of by an award of damages (see ***Cresto Machines (EDMS) BPK vs Die Afdeling - Speuroffisien S.A., Noord - Transvaal 1970 (4) S.A. 350 (T)).*** (see also the cases cited at folio ***90 ofHerbstein*** *(supra)* at page ***1075)***

[14] In the totality of what I said above I dismiss the application with costs.

S.B. MAPHALALA

JUDGE