

THE HIGH COURT OF SWAZILAND

AMOS VELEM KUNENE

1<sup>st</sup> Applicant

DAVID MASAKENI KUNENE

2<sup>nd</sup> Applicant

And

MONICA MATTHEWS N.O. et al

Civil Case No. 3417/2004

Coram: S.B. MAPHALALA - J

For the Applicants :MR. W. MKHATSHWA

For the Respondents:MR. B. MAGAGULA

RULING

(26<sup>th</sup> May 2005)

[1] The Applicants in this matter are applying that an Answering affidavit filed by the Respondents be declared inadmissible on the grounds that leave of court has not been sought prior to it being filed of record.

[2] The sequence of events giving rise to this application is as follows: On the 28<sup>th</sup> October 2004, the 1<sup>st</sup> Applicant filed an application on Notice of Motion for various forms of relief centred around the transfer of a certain property under a deceased estate. On the 14<sup>th</sup> January 2005, the 1<sup>st</sup> Respondent filed an Answering affidavit in response to 1<sup>st</sup> Applicant's Founding affidavit. The 1<sup>st</sup> Applicant in turn filed a Replying affidavit thereto thus completing the full set rendering the pleadings closed. On the 18<sup>th</sup> March 2005, the 1<sup>st</sup> Applicant sought and was granted leave to file a Supplementary affidavit. It appears from what is said by Mr. Magagula for the Respondent that he did not oppose the application for leave in this instance as he was made to understand that 1<sup>st</sup> Respondent would be allowed also to file an Answering affidavit to the Supplementary affidavit. The 1<sup>st</sup> Applicant duly filed this Supplementary affidavit in a filing Notice dated the 22<sup>nd</sup> March 2005. The 1<sup>st</sup> Respondent thereafter filed this contentious Answering affidavit in a filing and serving Notice dated the 26<sup>th</sup> April 2005.

[3] The arguments in support of the application not to admit the Answering affidavit is that it was filed after the pleadings have closed. It is contended in this regard that the said affidavit is raising new matters which were not raised in all three affidavits filed by the 1<sup>st</sup> Applicant. It was argued further that the 1<sup>st</sup> Applicant's Supplementary affidavit does not raise any new matter to warrant an answer by the 1<sup>st</sup> Respondent.

[4] Mr. Magagula for the 1<sup>st</sup> Respondent on the other hand applied that 1<sup>st</sup> Respondent be granted leave to file this affidavit in view of what has been raised in the 1<sup>st</sup> Applicant's Supplementary affidavit. He contended further that when he did not oppose the filing of the 1<sup>st</sup> Applicant's Supplementary he was of the view that 1<sup>st</sup>

Respondent would be allowed to file an Answering affidavit thereto. In any event, he contended that the 1<sup>st</sup> Applicant has not shown that he will be prejudiced by the filing of the said affidavit. The final contention by Mr. Magagula is that the Rules of Court are made for the court and not vice versa in that the justice of this matter requires that 1<sup>st</sup> Respondent file an answer to the 1<sup>st</sup> Applicant's Supplementary affidavit.

[5] The South African Appellate Division in the case of James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co. Ltd) vs Simmons N.O 1963 (4) S.A. 656 (A) at 660 D - F) has made the following authoritative pronouncement; and I quote:

"It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say those general rules must be rigidly applied. Some flexibility, controlled by the Presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted".

[6] In the instant case following the approach enunciated above I would allow the 1<sup>st</sup> filing of the Answering affidavit by the 1<sup>st</sup> Respondent regard to the fact that 1<sup>st</sup> Applicant has filed a Supplementary affidavit outside the usual set of affidavits. It appears to me that it will only be fair and just that 1<sup>st</sup> Respondent be allowed to respond to any issue raised in the Supplementary affidavit. It will also be fair and just to allow the 1<sup>st</sup> Applicant to also file a reply to complete the second set of affidavits. In the final analysis therefore the court will have a complete picture of the dispute.

[7] In the result, 1<sup>st</sup> Respondent is granted leave to file her Answering affidavit to the 1<sup>st</sup> Applicant's Supplementary affidavit. The 1<sup>st</sup> Applicant is further granted leave to file a Replying affidavit thereto. Costs to be costs in the cause.

S.B. MAPHALALA

JUDGE