IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1046/06

In the matter between:

REYNOLD BAARTJIES APPLICANT

VERSUS

J.K. MASEKO COMPANY (LTD) 1st RESPONDENT

THE CHAIRMAN OF THE LIQUOR LICENSING BOARD 2nd RESPONDENT

THE ATTORNEY GENERAL 3rd RESPONDENT

CORAM: MAMBA AJ

FOR APPLICANT: S. A. NKOSI

FOR 1st RESPONDENT: ADV. M. VAN DER WALT

FOR 2nd AND 3rd RESPONDENTS: MS Z. MKHWANAZI

JUDGEMENT
22nd AUGUST, 2006

[1] The applicant was ordered by this court on the 5th April 2006 to file his replying affidavit by the 10th April 2006.

On that day his attorneys wrote a letter to the 1st Respondent's Attorneys and advised them that "due to unforeseen circumstances" the applicant would not be able to file his replying affidavit as ordered by the court, but would file it on the 11th April 2006. This letter was followed by another one dated the 13th April 2006 wherein again "due to unforeseen circumstances" the applicant advised that he would be only able to file his replying affidavit on the **18th** day of April 2006. This letter said it was a confirmation of an undertaking made to **1st** respondent's attorneys on 11th April 2006. The court was not involved in all these extensions of the deadline.

[2] The replying affidavit which turned out to be a long, repetitive, argumentative and rambling affair was eventually filed on the 21st April 2006. An application for condonation for the late filing of such affidavit was filed on the 27th April 2006 and the supporting affidavit thereto is very brief and cursory; even perfunctory in its tenor. I reproduce it hereunder in full:

> "I, the undersigned
>
> **REYNOLD BAARTJIES**
>
> Do hereby make oath and state that::
>
> 1
>
> I am the Applicant herein and am also the Applicant in the main Application. The facts deposed hereunto are to the best of my knowledge and are both correct and true.
>
> 2.
>
> On the 5th April 2006 this Honourable Court issued an order in respect of the main Application in terms of which inter alia the Applicant thereto (myself) was to file my Replying Affidavits by the 11th April 2006.

3.1. During consultation with my Attorneys wherein I was issuing instructions for the Replying Affidavit I discovered that an allegation in paragraph 1 of the 1st Respondents Answering .Affidavit was to the effect that the 1st Respondent's Board of Directors met and issued a resolution on the 4th January 2006 which resolution is annexed to the Answering Affidavit marked - JKM1".

3.2. Being advised and verily believing that the signatory to the Resolution (Annex "JKM1") is the only surviving director of the 1st Respondent, the others being deceased, and seeing that "Annex JKM1" does not reflect which directors were present during the meeting, I instructed my Attorneys that the issue of the Resolution be investigated, i.e. whether or not indeed it was passed in a meeting of the Board of Directors and if yes which directors were present.

3.3. The other directors of the 1st Respondent, except Mr Musa Maseko (the signatory to Annex "JKM1" and Deponent to the Answering Affidavit) according to the 1st Respondents papers reside in Soweto Johannesburg, South Africa.

3.4. As a result of the distance between Swaziland and Soweto, South Africa, the investigation could not be completed by the time the Replying Affidavit was supposed to be filed by virtue of the Court Order of 5* April 2006.

3.5. The investigation has only been completed on the 19th April 2006 whereupon my Attorneys drafted the Replying Affidavit in readiness for my signature.

4.

On the 11th and 13th April 2006 I advised, by way of letters written by my Attorneys, the 1st Respondent of my inability to file my Replying Affidavit by the date stipulated in the Order of Court on the 5th April 2006. (I beg leave to refer the Court to annex "CA1" and "CA2" hereto).

5.

For the reasons aforesaid 1 was unable to comply with the Order of Court of the 5lh April 2006 and I beg this Court's indulgence in that regard as such failure was occasioned by circumstances beyond my control in that the information sought to be discovered through the investigation was crucial for the determination of the issues in the main Application but was not readily obtainable.

WHEREFORE I PRAY THAT this Honourable Court grants an order as sought.

Deponent

THUS DONE AND SWORN TO BEFORE ME AT MBABANE ON THIS 27™ DAY OF NOVEMBER 2005 THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT.

COMMISSIONER OF OATHS"

[3] By notice dated the 26th day of June 2006 and served on the applicant's attorneys on the same day, the 1st respondent gave notice that it would apply at the hearing of the matter, to have

paragraphs 3.1, 3.2, 3.4, 3.5 and 5 struck out inasmuch as they contained material or averments that are hearsay and inadmissible. First respondent further complained that whilst the affidavit referred to matters occurring after the 5th day of April 2006, it proclaimed that it was sworn to on the 27th day of November 2005 and this was, the 1st respondent said, an irregularity.

[4] The applicant did not respond to this notice until the 22nd day of August, 2006 when the applicant's application to strike out was argued before me. It was argued, from the bar by the applicant that the date of the 27th day of November 2005 appearing on its affidavit was nothing more than a minor typographical error and the respondent's objection, one too technical or a quibble that the court should not entertain and that the affidavit must be admitted without requiring an explanation from the applicant or the commissioner of oaths to such affidavit. I had my doubts.

[5] Conceding that the allegations contained in the paragraphs sought to be struck out were indeed hearsay, Mr Nkosi for the applicant submitted that the material complained of was permissible or admissible hearsay simply because, as he said, not prejudicial to the respondents. I can not agree.

[6] In application proceedings, hearsay evidence is admitted provided that the maker of that statement reveals the

source of such information and states the grounds upon which he believes such information and why such source is unable to make or provide this evidence itself. One immediately notes that the applicant's affidavit quoted above woefully fails to meet these requirements of the law. Applicant does not even state who conducted the investigation and what the outcome thereof was.

[7] In urgent applications, the rule is stricter or more circumscribed. H.J. ERASMUS in his work **"SUPERIOR COURT PRACTICE"** at B1-54-55 states the rule as follows:

> "In urgent matters the court is entitled to admit hearsay evidence in an affidavit provided the source of the information and the grounds for belief in its truth are stated. The type of case in which such evidence is accepted, if these prerequisites are complied with, is one in which it is necessary to restrain immediate injury and to keep matters in **status quo."**

[8] In the light of the above statement of the law, I ruled that the offending paragraphs be struck out and further ordered that the applicant should pay the costs occasioned by such application to strike out as an expression or mark of the court's disapproval of the applicant's slapdash or near cavalier manner in dealing with this affidavit and the objection thereto.

[9] What remains of the affidavit in support of the application for condonation does not support the application inasmuch as it does not explain the applicant's failure to file his replying affidavit as ordered. Applicant then applied for leave to file a supplementary affidavit to cure this deficiency. It was argued on behalf of the applicant that to refuse to grant the applicant leave to supplement his affidavit would throw out his replying affidavit. I agree. I am unable to agree though that such refusal would be a violation of the **audi alteram partem** rule.

[10] Of course the applicant has been afforded a reasonable opportunity to be heard. He has spurned this chance. He has chosen to do things in his own way and at his own pace and time. This court cannot countenance this. To do so would cause undue, unwarranted and untold postponement and delays of cases. The administration of justice or trial of cases in this court would be jammed or clogged. The net result would be that justice would be delayed and justice would be denied.

[11] Before refusing the application for leave to file a supplementary affidavit as stated above, I pointed out to counsel that, having gone through all the papers including the intended replying affidavit, my prima facie view was that, with or without the replying affidavit, this application would turn around whether or not there was an oral agreement of lease between the applicant and the **1st** respondent. This is a question of fact to which there is a real or serious disagreement or dispute between the applicant and the 1st respondent and this, to my mind, can not be resolved on the papers. The filing of the replying affidavit would not resolve this seemingly intractable dispute. It would therefore serve no useful purpose in as far as getting the matter closer to its conclusion or finalisation.

MAMBA AJ