IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3760/07**

In the matter between:

DUET SAFE FREIGHT (PTY) LTD **APPLICANT**

AND

PURELL (PTY) LTD **RESPONDENT**

CORAM **MAMBA J**

FOR APPLICANT **MR G. MASUKU**

FOR RESPONDENT **MS X. HLATSHWAYO**

JUDGEMENT

9th NOVEMBER, 2007

[1] Both parties herein are two companies duly registered in terms of the Company laws of Swaziland.

[2] On the 18th October 2007, the applicant sought and obtained, ex parte, an order ***inter alia*** that

" A rule nisi issues with immediate effect returnable on a date to be fixed by the above Honourable Court calling upon the Respondent to show cause why an order in the following terms should not be confirmed and made final on its return date :

(i) Directing the Respondent to immediately issue Applicant with surveying and drilling results as per their surveying, drilling and sinking a borehole contract.

The rule nisi was returnable on the 26th day of October, 2007.

[3] On the 25th October, 2007 an answering affidavit was filed on behalf of the respondent by one Royet Ntshalintshali who stated that he is an adult male Swazi and "the Managing Director of the respondent, [and is duly authorized to depose hereto by virtue of my position in the company."

[4] Mr Ntshalintshali does not in his papers allege that he is authorized by the Directors of the respondent to oppose this application, and the applicant has challenged his authority to do so, stating rather hyperboly that the

"Respondent's answering affidavit should be dismissed with punitive costs as they lack a Director's resolution authorizing respondent to litigate and depose to affidavits in support of any pleading which thing is peremptory and its absence renders whatever process filed to be fatally defective. Wherefore, what respondent purports to do is tantamount to defrauding the

legal system hence the above Honourable court should show- its utmost disapproval of same through dismissing respondent's pleadings with an award of attorney-client costs"

[5] The person whose authority is challenged bears the onus to satisfy the court that he has the necessary mandate or authority. In the case of **MALL (CAPE) (PTY) LTD v MERINO KO-OPERASIE BPK 1957 (2) SA 347** the applicant's contention was considered by the court and **WATERMEYER J** stated that:

> "I proceed now to consider the case of an artificial person, like a company or cooperative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorized the institution of notice of motion proceedings (see for example Royal Worcester Corset Co v Kesler's Stores, 1927 CPD 143; Langeberg Ko-operasie Beperk v Folscher and another 1950 (2) SA 618 (C)). Unlike an individual an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the Secretary or General Manager of a company would not necessarily know whether the Company had resolved to do so, nor whether the necessary formalities

had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the court or that proceedings which purport to be brought in its name have in fact been authorized by it.

There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized by the company to do so (for example Lurie Brother Limited v Archache, 1927 NPD 139, and the other cases mentioned .... This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized would be provided by an affidavit by an official of the company

annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court then I consider that a minimum of evidence will be required from the applicant...."

[6] I also refer to the judgement of this court in the case of Wiz Tech Investments (Pty) Ltd and Ian Nxumalo (case 2717/07).

[7] Faced with the above submissions, Counsel for the respondent has submitted that Mr Ntshalintshali who has deposed to the affidavit is, by virtue of his position as Managing Director of the respondent authorized by the memorandum and or articles of association of the company to oppose this application without a resolution of the Directors. These documents, it has been argued, are public documents and the applicant ought to know about such powers vested in the Managing Director. Mr Ntshalintshali has, however, not alleged in his opposing affidavit that he is specifically mandated and or authorized by the respondent's constitution

to oppose this application even without a resolution of the Board of Directors of the respondent.

[8] Respondent's Counsel has applied for leave to submit the respondent's memorandum or articles of association of the respondent to prove the alleged authority or mandate. Counsel submitted that the objection is purely technical in nature and does not address the real issues between the parties. It was argued further that no prejudice would be suffered by the applicant if such leave be granted by this court.

[9] I am not persuaded that it is proper or just to unsuit a litigant in the position the respondent merely on such technical grounds which do not address the merits of the dispute between the parties. After all, this is an urgent application whichwas served with the rule nisi upon the respondent on the 18th day of October, 2007 "through issuing process to Nontobeko Gina who was the receptionist and person found apparently in charge of the premises at the time of serving."

[10] The rule nisi is still in place and the respondent's application for leave to file an extract of its memorandum and articles of association is not an application to grant the requisite mandate to Mr Ntshalintshali, ***ex. post facto,*** to do

what he did without a mandate, ie to oppose this application. I do not think the applicant would, in the circumstances, be in any way prejudiced by allowing the respondent's application for leave to file the said documents, subject to the parties herein having the right to address the court on such documents. The application is therefore granted and the main application shall be placed before me for argument on a date to be determined by this court.

[11] The respondent has sought the court's indulgence herein and it has to bear the costs occasioned by such indulgence. The respondent shall bear today's wasted costs and the costs of the 2nd November, 2007.

MAMBA J