

ITS' THE HIGH COURT OF SWAZILAND

MUSA SIB AND ZE o.b.o

1st Applicant

JANE BASIAME NGWAMATSOKO

2nd Applicant

AGNES BAITEBADI MOROTSI

3rd Applicant

DR A. K. KASHULUZA

4th Applicant

MR IDRIS MZLMBIRI

5th Applicant

KOONTSE MOLEMOENG

6th Applicant

PATRICK KRVANUKA

7th Applicant

KLSAKYE HOSEA SEKITOLEKO

8th Applicant

And

STATION COMMANDER ROYAL SWAZILAND POLICE MBABANE N.O.

(MBABANE POLICE STATION)

1st Respondent

COMMISSIONER OF POLICE N.O.

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

Coram: S.B. MAPHALALA – J

For the Applicant: MR. M. SIBANDZE

For the Respondents: MR KHULUSE

JUDGMENT 2nd March 2007

[1] On the 21st November 2006, this court granted an order in the following terms:

1. That the usual forms and procedures and time limits relating to the institution of proceedings are dispensed with and allowing the matter to be heard as one of urgency.

2. That a role *nisi* is issued with immediate effect calling upon the Respondents to show cause on 1^u December 2006. why an order in the following terms should not be made final.

2.1. That the Respondents are ordered to refrain from taking the aforesaid individuals in:o custody in respect of any alleged immigration offences and in the event that such offences are reasonably suspected by the Respondents to have been committed by ±ie aforesaid individuals to commence prosecution by way of summons and not arrest.

2.2. That the Applicant should file supplementary affidavit to the application.

2.3. That the Respondents should file opposing affidavits on or before the 28th November 2006.

[2] The above order is founded on the affidavit of Mr. Musa Sibandze who is representing the Applicants. He has filed a number of pertinent annexures to this affidavit. The Respondents have filed an answering affidavit of one Takhona Matsebula who is employed by the Swaziland Government as Senior Immigration Officer. In turn the Applicants have filed a replying affidavit of the 8th Applicant Kisakye Hosea Sekitooleko. The Applicants have also filed a supplementary affidavit and annexure "A" being a founding affidavit of the 8th applicant.

S.

[3] The matter then came before me for arguments on whether the above-cited order in paragraph [1] should be confirmed. The Applicant also made an application to strike out the answering affidavit of Takhona Matsebula. The argument in this regard is that the Attorney General, who is the 3rd Respondent herein has purported to file an answering affidavit under the case number relating to this matter, however according to the aforesaid answering affidavit, the affidavit relates to a matter in which the Applicant is Kisakye Hosea Sekitooleko and 1st Respondent is the Commissioner of Police, 2nd Respondent is the Attorney General and 3rd Respondent is Sihlongonyane and 4th Respondent is Margaret Takabura.

[4] It is contended that in the matter before court the Applicant is Musa Sibandze and the aforesaid Sihlongonyane and Takabura are not parties. ~»Vere this an error in mere particulars of claim it could be rectified by an implication for amendment. However, it is trite that an affidavit cannot be amended. The entire affidavit of Matsebula is therefore irrelevant to the current proceedings and stands to be struck out as *per* the requirements of Rule 23 (2) of the High Court Rules. The Rule reads as follows:

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of rule 6(14), but the court shall not grant the same unless it is satisfied that the Applicant will be prejudiced in the conduct of his claim or defence if it be not granted.

[5] It would appear to me that *Mr. Sibandze* is correct on the trite principle that an affidavit cannot be amended and therefore the entire affidavit of Matsebula is irrelevant to the present proceedings and stands to be struck out in terms of Rule 23 (2) of the High Court Rules and so it is ordered.

S.B. MAPHALALA

JUDGE