

IN THE HIGH COURT OF SWAZILAND

Civil Case No. 3218/2007

<b>DAVID DLAMINI</b>	<b>1<sup>st</sup> Applicant</b>
<b>GIDION GWEBU</b>	<b>2<sup>nd</sup> Applicant</b>
<b>PETER DLAMINI</b>	<b>3<sup>rd</sup> Applicant</b>
<b>MAMATHE DLAMINI</b>	<b>4<sup>th</sup> Applicant</b>
<b>SIBONGILE MAVUSO</b>	<b>5<sup>th</sup> Applicant</b>
<b>RICHARD SACOLO</b>	<b>6<sup>th</sup> Applicant</b>
<b>EUNICE DLAMINI</b>	<b>7<sup>th</sup> Applicant</b>
<b>KENNETH KUNENE</b>	<b>8<sup>th</sup> Applicant</b>
<b>PROJECT AFFECTED PEOPLE IN THE CONSTRUCTION OF THE MBABANE BYPASS (MR - 3) ROAD</b>	<b>9<sup>th</sup> Applicant</b>
And	
<b>MINISTER OF PUBLIC WORKS AND TRANSPORT</b>	<b>1<sup>st</sup> Respondent</b>
<b>WBHO CONSTRUCTION (PTY) LTD</b>	<b>2<sup>nd</sup> Respondent</b>
<b>THE ATTORNEY GENERAL</b>	<b>3<sup>rd</sup> Respondent</b>

**Coram: S.B. MAPHALALA – J**

**For the Applicants: MISS C. DLAMINI**

**For the 1<sup>st</sup> and 3<sup>rd</sup> Respondent: MR. KUNENE AND MR DLAMINI (Attached to the Attorney General's Chambers)**

**For the 2<sup>nd</sup> Respondent: MR. J. HENWOOD**

**RULING**

(On application to file a supplementary affidavit) 20<sup>th</sup> September 2007

[1] During the course of arguments when Counsel for the Swaziland Government was to submit his arguments on the further points of law found in the Notice dated 11<sup>th</sup> September 2007, Counsel for the Applicant moved an application from the bar to the effect that an affidavit by the Director of the Swaziland Environment Authority be admitted by the court to form part of the Applicant's case.

[2] Counsel for the Applicants motivated this application on what is stated by the learned authors, *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition* at page 360 where the learned authors have cited what has been stated by the Appellate Division in the judgment of Ogilvie Thompson JA in *James Brown's Hamer (Pty) Ltd vs Simmons N.O. 1963 (4) S.A. 656 (A)* at 660D - F as follows:

**"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 proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always 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".**

[3] In the above cited case of the Appellate Division it was held that where an affidavit tendered in motion proceedings is both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the court: He must both advance his explanation of why the affidavit is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Counsel for the Applicant also relied on what is provided by the Rules of this court in Rule 28 (8) thereof where the following is provided:

**"The court may during the hearing at any stage before judgment grant leave to amend any pleading or document on such terms as to costs or otherwise as to it seems fit".**

[4] The argument for the Applicants in this regard is that although the above-cited rule applies in cases of amendment this rule can find application in respect of further affidavits. It was also contended for the Applicants that this affidavit by the Director will not only assist the Applicant

but the Respondents and the court will further benefit from its contents in the resolution of this case. Counsel for the Applicants further contended that there is no prejudice that can be caused by the reception of this affidavit.

[5] Counsel for the Respondents all opposed the admission of this affidavit citing different reasons. The main reason being that one of the Respondents who is still to make submissions have already raised a point of law on non-joinder in that the Applicants seek to have the Environmental Compliance Certificate issued by the Director of Swaziland Environment Authority suspended or cancelled but have failed to join the authority as party to the proceedings in that the authority has an interest in the matter and would be affected by a grant of an order sought because they are the ones who are empowered by statute to issue the certificate, administer and monitor compliance with the terms and conditions, and to suspend and cancel the certificate in circumstances where it deems dangerous or adverse to the environment or the public. Their non-joinder renders them spectators in an activity or "game" where they are empowered by statute to be in charge of.

[6] It would appear to me that although the affidavit sought to be entered is very important to the court the application by the Applicants at this stage is likely to steal the thunder of the Respondents point of law as outlined above in paragraph [5] *supra*. As much as I agree with the legal authorities cited by the Applicants as outlined in paragraph [2] of this judgment however the Respondents have already raised the preliminary objection in this regard. My view is what has been suggested by *Mr. Dlamini* for the Respondents that the said affidavit remain in abeyance until Respondents have argued the point on the non-joinder and the Applicants can then bring the issue of the affidavit in their replies. The court will then have to decide the issue of the non-joinder against this controversial affidavit. This appears to me to be the most practical way of dealing with this affidavit.

[7] In the result, the application for the filing of this further affidavit put in abeyance until Applicant's replies to *Mr. Dlamini's* arguments on the further points of law. I make no order as to costs in that costs to be costs in the course.

**S.B. MAPHALALA, JUDGE**