IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 965/12

In the matter between

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY STUDENT REPRESENTATIVE COUNCIL — APPLICANT

and

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY
RESPONDENT

Neutral citation: Limkokwing University of Creative Technology Student Representative Council v Limkokwing University of Creative Technology (965/12) [2012] SZHC 112

Coram: DLAMINI J.

Heard: **30th May, 2012**

Delivered: **4th June, 2012**

Urgent application – locus *standi in judicio* of an association – urgency – non joinder

Summary *In casu* is an application by way of urgency for a restraint order against the Respondent who

has called upon members of the Applicant to re-register for admission by the Respondent.

[1] The chronology of events briefly is that the litigants herein including the Ministry of Labour and Social Security engaged in a series of negotiations. The bone of contention is the administration of the book allowance. It would seem that the Applicant had first sought the intervention of the Ministry of Labour and Social Security by requesting the former to redirect deposit of the book allowance to the members of Applicant's personal account instead of the Respondent. The outcome of these negotiations are not clear from the papers before me except that it was agreed that the Applicant should pursue its matter with the Respondent. The result was a series of negotiations which did not bear any positive fruits. The members of Applicant then engaged in a strike, demanding Respondent to oblige. Respondent scheduled a meeting for the 23rd ultimo.

[3] However, that meeting never saw the light of the day as what followed was violent action wherein Respondent issued notice to all members of Applicant to reapply. Respondent has raised three points *in limine* viz., that the Applicant has no *locus standi;* the Applicant ought to have cited as Respondent, the Ministry of Labour and Social Security; and that the matter was not urgent.

[4] The last two points *in limine* are usually a matter of balance of preponderance while the first point which is on *locus standi* once determined will result on a definite response. It is therefore always prudent to deal with the question of *locus standi* as of priority in application of this nature.

[5] Respondent's counsel submitted in support of the *locus standi* that the Applicant has not alleged in its founding affidavit that it is an association or firm as envisaged by Rule 14 of the rules of this court.

[6] Rule 14(2) reads:

''*A partnership, a firm or an association may sue or be sued in its name.*''

[7] The above calls for me to enquire as to the status of the Applicant. In other words, is the applicant a partnership, a firm or an association''. The answer lies in the very same Rule 14. Sub-rule (1) informs the court that;

> ''*association means any unincorporated body of persons not being a partnership*'', ''*firm means a business...*'' and ''*partnership means business...*''

[8] The Applicant avers at paragraph 4 of its founding affidavit:

> ''*The Applicant is the Limkokwing University of Creative Technology Student Representative Council, a body selected to represent students, take care of all grievances of students, and to negotiate with school management in all respect pertaining to students' issues (hereinafter called the S.R.C.) Limkokwing University, District of Hhohho Swaziland''.*

[9] It is clear from paragraph 4 of the Applicant's founding affidavit that the Applicant is not a business and therefore cannot fall

under the categories of a firm or partnership. It can be inferred from paragraph 4 supra that the Applicant is an association. This status is confirmed by Applicant's own constitution as it indicates that it is a union, commonly referred to in our law as a voluntary association and its objectives attest to the same.

[10] Having found that the Applicant is an association, it follows therefore that in terms of Rule 14 (2) *op cit*. it has a right to sue and be sued **in its name**.

[11] Discussing this Rule, **Nathan Barnett, Rules Practice of Supreme Court of South Africa**, at page 106 writes as follows:

'' *Prior to this rule it was held that an unincorporated association could only sue or be sued as such if it was a universitas having perpetual succession and capable of owning property apart from its members.*''

[12] The learned author then cites the authorities in support of the old position as **Morison v Standard Building Society 1932 AD 229**, **Levin v Transvaal Miners Assn 1912 WLD 144**; **Ex parte Doornfonteni – Judiths Paarl Ratepayers Association 1947 (1) SA 476** and many others.

[13] The position of the law as narrated by the distinguished author Nathan was also highlighted by **Isaacs, Beck's Theory and Principles of pleadings in Civil Actions, 4th Ed**, at pages 8 in the following manner:

> '' *The distinction between corporations and voluntary associations had important results when considering the*

question of parties in an action, for if the action concerned a juristic person it had to be instituted by or against that juristic person; but if, on the other hand, it concerned a mere voluntary association, the only way in which such a body could sue or be sued, as a whole and so as to bind all its members, was by making them all parties to the action, either as Plaintiffs or Defendants as the case required. ***This difficulty has, however, to a large extent, disappeared by reason of Rule 14****.* (my emphasis).

[14] This Rule eroded the common law position that associations, firms and partnership, as they are not *legal persona*, could not be cited in legal proceedings. One wishing to recover against them could only cite the individual members. Extending the same principle to a trust, the learned judge Horn J.A. in **Cupido v Kings Lodge Hotel 1999 (4) SA** 257 at 260 articulates on the rationale behind the Rule:

‘ ‘*At common law for example a partnership could not be sued other than through its partners. An unincorporated association or firm could likewise not be sued other than through its members. A company could trade under one name but had to be cited in legal proceedings in the name by which it was registered. These requirements create problems for litigants by reason thereof that the correct names or identities of business or their constituents, particularly in case of association and partnership, were not always readily ascertainable. This often led to a party who was sued taking technical points of being incorrectly cited, thereby escaping liability. It can therefore be stated with some conviction that Rule 14 was introduced in order*

to streamline the procedure of citation of litigating parties and to meet the situation of particularly the plaintiff when claiming damages from a defendant who trades not as an individual but under another name either on his own or together with others.''

[16] Leveson J. in **Two Sixty Four Investment (PTY) Ltd v Trust Bank 1993 (3) SA 384** had taken the same view when he propounded:

> ' '*of these Rules Joubert (ed) The Law of South Africa Vol 3 para 55 says that they ' ' are designed to solidify and facilitate actions and applications by or against partnerships, firms and associations which at common law cannot generally sue or be sued in their own names apart from the members constituting it.''*

[17] It would be remiss of me however not to hasten to state categorically clear that the citing of the association, firms and partnership by their own names does not in law change their status. It does not in any way endow them with rights and duties which at common law they do not have. That they are sued or can sue in their own name ends there and nothing further. The legislature could never be said to have intended to change the status of these associations, firms and partnership or trusts. This can be inferred from the reading of the entire Rule 14. I will confine myself to associations in demonstrating this position.

[18] Rule 14(10) reads:

‘ ‘*Paragraphs (d) to (h) of sub-rule (5) shall apply mutatis mutandis when-*

(a) a plaintiff alleges that any member, servant or agent of the defendant association is liable in law for its alleged debt;

(b) a defendant alleges that any member, servant or agent of the plaintiff association is responsible in law for the payment of any costs which may be awarded against the association.

[19] Sub-rule 5(d) and (h) read:

‘ ‘*(d) A plaintiff suing a firm or a partner (association) and alleging in the summons or notice of motion that any person was at the relevant date the proprietor or a partner (or a member) shall notify such person accordingly by delivering a notice as near as may be, mutatis mutandis, in accordance with Form 9 of the First Schedule.*

(h) Execution in respect of a judgment against a partnership (association) shall first be levied against the assets thereof and, after such execution, against the private assets of any person held to be, or held to be estopped from denying his status as a partner (member), as if judgment had been entered against him. (words in brackets are my own).

[20] From the aforegoing, it is clear that the litigant who is sued by an association may during the proceedings by notice inform the individual members. Once granted costs, the litigant may execute against the assets of the individual members where assets of the association are not available. This is therefore a clear demonstration that the legislature never intended to

change the status of these bodies when giving them the leeway to be cited in their own name.

[21] The learned authors **Herbstein and van Winsen** in **The Civil Practice of the Supreme Court of South Africa** at page 263 could never be more precise on this point as they state as follows:

‘ ‘Rule 14(2) provides in so many words that a firm may be sued in its own name. The plaintiff need not allege the name of the proprietor. The plaintiff may, but is not obliged to attempt to discover who wore the mask of the firm (association, partnership, trust)(words in brackets my own) name at the relevant date’’ – apparently the date when the cause of action arose. ***It has nothing to do with the substantive law concerning the nature and status of the defendant.***’’ (my own emphasis).

[22] In the premises, I hold that the Applicant was correctly cited.

[23] If I am wrong in this approach, I turn to consider Respondent’s own conduct in relation to the Applicant and I do so without necessarily setting a precedent. Although the Respondent did not file an answering affidavit which would have dealt with the facts as alleged by the Applicant, it became apparent during *viva voce* submission by counsel for both parties hereto that it was common cause that there were series of negotiations between the Applicant and the Respondent. In other words, Respondent recognises the existence and capacity of the Applicant in matters pertaining to members of Applicant’s welfare. It therefore follows that it should be contemplated by either party that in the event a dispute arises between them, the courts of law will be

approached for the appropriate redress. To subsequently hold that one party lacks the capacity to institute legal proceedings, with due respect to counsel, cannot stand as such authority is a natural consequence of the relationship between the two parties, that they have themselves created. Probably that is the *raison d' etre* of Rule 14.

[24] The question of *locus standi*, however, I am afraid, would seem from decided cases not to end here. I juxtapose the case *in casu* with that of **Swaziland Agriculture and Plantation Workers Union v United Plantation Swaziland Limited case No. 79/98** unreported. The court in that case was seized with the question of *locus standi.* The 1st Applicant was an association whose mandate emanated from the Recognition Agreement and Disciplinary code. The members of Applicant had been dismissed from work by the Respondent. Applicant lodged an application at the Industrial Court for their immediate reinstatement. The court held as follows at page 6:

> *''the Applicant does not pray for an interim relief ordering the Respondent to abide by the terms of the recognition agreement and disciplinary code. If the application was for such an interim order, then surely the applicant would have locus standi since the applicant and the Respondent are parties to the agreement. But since what the applicant prays for is in effect the immediate reinstatement of the employees, the Applicant has no locus standi upon the authority of Swaziland Manufacturing and Allied Workers Union and 99 others Case No. 76/97.....''*

[25] From the above and other plethora of authorities, the question of *locus standi* is not determined only from the basis of the legislation but also from the constituency of the litigant.

[26] On a perusal of the Applicant's constitution, it is evident that the core business of Applicant is as outlined under Part Three Article 3.2 which reads:

'' to identify, advance and promote the interest of the students through SRC''.

[27] One can safely conclude that all other duties and responsibilities of the applicant are ancillary to the above objective.

[28] I am therefore duty bound to enquire on whether the orders sought by the Applicant seek to enforce the above cited object. The Applicant prayers appear in the notice of motion as:

'' 3, restraining and/or interdicting the Respondent or any other person acting on instructions of the Respondent from re-registering of the students of Limkokwing University of Creative Technology.

4. directing the Respondent to engage the Student's Representative Council (SRC) on the issues pertaining the student welfare.''

[29] By analogy, the question that follows, '' Is the restraint order to re-register the student in line with the object of the Applicant?'' To quote verbatim, does the non registration of the members of

Applicant ***''advance and promote the interest of the student through SRC''***

[30] In all fairness the answer must be in the negative. This means therefore Applicant has no *locus standi in judicio* in this regard by reason that this prayer falls outside Applicant's mandate and therefore Applicant is acting *ultra vires* its jurisdiction.

[31] In the alternative, the registration and de-registration of a student arises from a contractual relationship between the student as an individual and the Respondent. The Applicant is never a party to such and therefore cannot seek redress on transactions in which he was never a party. At any rate, registration of students is an administrative function by the Respondent and the courts should be slow in usurping or interfering with administrative powers of legally constituted entities.

[32] I must add that article 4 of Applicant's constitution add more weight to the findings on the duties and responsibilities of the Applicant as it states:

> *''4.1 The Student Representative Counsel shall be the supreme decision making body on matters <u>within its jurisdiction</u> on behalf of the student body respectively''. (words underlined are my emphasis).*

The end result therefore is that registration of students is a matter that falls outside the jurisdiction of Applicant.

[33] Prayer 4 is calling upon the Respondent to engage the Applicant on issues pertaining to the students' welfare. The same query is attended by prayer 4. Does this order if granted ''**advance and promotes the interest of students welfare?**'' The response is obvious and it must be a 'yes'. In this regard the Applicant has acted *intra vires* its mandate and therefore has the necessary *locus standi in judicio*.

[34] However, applicant's *locus standi* at present is confounded by the following averments at paragraph 21 of its founding affidavit:

' *''I submit that whilst the S.R.C. were waiting to be called by Management on our new proposal, we heard from the media that the Management was calling upon students into campus on Monday the 28th of May 2012 for re-registration much to the surprise of the S.R.C. who were expecting a report from Management on the new proposal which would have been a long term solution.''*

[35] I have already pronounced on the status of applicant that it is a voluntary association without any perpetual succession in title and therefore membership terminates as soon as one ceases to be a student. No doubt in the present proceedings and from Applicant's showing, as evident in *para 21 supra* there were no students of Respondent on 28th May, 2012 hence the invitation that was extended for registration. That the invitation called upon them to re-register is nothing but an indication that Respondent was extending preference over them. Whether they were at one point in time ever deregistered, as I have already ruled, is a question outside the domain of Applicant. It is a

matter which stands to be challenged by no other than the person of the students.

[36] Similarly as there were no students on 28th of May, 2012, at law there was no S.R.C. as it cannot exist outside its members. It was therefore a misnomer to bring the present application as by its nature, the Applicant did not exist. This application was to be lodged before the relationship between the Respondent and the students terminated. Should the Applicant be inclined to bring such an application in future, it has to show that it has been constituted according to its constitution.

[37] Although it is unnecessary for me to make any pronouncements on the two issues remaining, I will for the benefit of academicians.

[38] As the question of urgency was predicated upon prayer 3, the point by Respondent on urgency must succeed.

[39] It was contended on behalf of Respondent that the Ministry of Labour and Social Security should have been co-joined as respondent in this matter. Counsel for Respondent reasoned that the Applicant seeks for an order which will have a direct impact on the management of the book allowance and the sponsor, being the Ministry of Labour and Social Security should be given the opportunity to defend the proceedings.

[40] **Isaacs in Beck's Theory and Principles of Pleading in Civil Actions, 4th Ed** at page 11 in his wisdom postulates:

‘ ‘*The general rule may be stated that when a person has an interest of such a nature that he is likely to be prejudicially affected by a judgment given in the action, such person must be joined either as plaintiff or defendant. The true test is whether or not he has a direct and substantial interest in the proceedings. A person should also be joined if it would be convenient in the administration of justice to so join him.*’’

[41] Although it has not been so succinctly averred by the Applicant, it would seem to me that Applicant abandoned the negotiation of the book allowance being deposited by the Ministry of Labour and Social Security to each of its member’s account and took the line that Respondent should stop distributing educational material to them but that they make the choice as to what educational material would they utilize with regard to the book allowance. Had the former position been attainable, the point on non-joinder would stand for Applicant would have sought to change the Ministry of Labour and Social Security’s administrative decision on the question of the book allowance. However, in considering that the Applicant has now adopted the latter position, the submission on non-joinder should fail.

[42] In the totality of the above I therefore enter the following orders:

The application is dismissed and there being no Applicant, I am not inclined to make an order of costs against the deponent and therefore no order of costs.

M. DLAMINI

JUDGE OF THE HIGH COURT

FOR APPLICANT: **MR C. MOTSA**

FOR RESPONDENT: **MR SIBANDZE & S. ZIKALALA**