



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 545/19

In the matter between:

JABULANI MBUSO GULWAKO

APPLICANT

AND

SWAZILAND LOCAL KOMBIS

1st RESPONDENT

ASSOCIATION

LOCAL KOMBIS ASSOCIATION

2nd RESPONDENT

(MBABANE BRANCH)

MBABANE KOMBIS ASSOCIATION

3rd RESPONDENT

THEMBA DLAMINI

4th RESPONDENT

SIFISO KUNENE

5th RESPONDENT

THE NATIONAL COMMISSIONER

OF POLICE

6th RESPONDENT

THE ATTORNEY GENERAL

7th RESPONDENT

Neutral citation: *Jabulani Mbuso Gulwako and Swaziland Local Kombis Association & 6 Others* [545/19] [2019] SZHC 105 (18th June, 2019)

Coram: FAKUDZE, J

Heard: 7th May, 2019

Delivered: 18th June, 2019

RULING

BACKGROUND

[1] On the 25th March, 2019 the Applicant filed an Urgent Application seeking for an order in the following terms:

1. *Dispensing with the normal forms and rules of service relating to the institution of proceedings and hearing this matter as one of urgency;*
2. *That the Applicant's non compliance with the rules of court be condoned;*
3. *That pending finalisation thereof, a rule nisi do hereby issue returnable on a date to be appointed by this court, calling upon the Respondents to show cause why an order in the following terms should not be made final;*

3.1 *Interdicting and restraining the Respondents and cohorts from interfering with the smooth operations of the Applicant's transport business (buses), under the style Ding Dong Transport*

in Mbabane bus terminus.

3.2 *Interdicting and restraining the Respondents and cohorts from conducting themselves in a manner likely to provoke the breach of peace at the Mbabane bus terminus;*

4. *That and to give effect to prayer (3.1) and (3.2) above, the Deputy Sheriff for the District of Hhohho be duly assisted by members of the Royal Eswatini Police Service (REPS) Mbabane or whichever place upon which such assistance may be sought by the Deputy Sheriff to such extent as may be necessary to give effect to the court order;*
5. *That prayers 1, 2, 3, 3.1, 3.2 and 4 above operate with immediate effect as interim relief pending the return date herein;*
6. *Granting Applicant any further and/or alternative relief.*

[2] The court granted the Interim Order and same was returnable on the 27th March, 2019.

- [3] The Second and Third Respondents filed a Notice of Intention to Oppose dated 25th March, 2019.
- [4] The Respondents then filed the Answering Affidavit and the Applicant filed the Replying Affidavit. On the return date, the parties had not filed a bundle of authorities and the matter was postponed to the 28th March, 2019.
- [5] On the 28th March, 2019, the Respondents filed an Interlocutory Application from the Bar and the time lines for the filing of the Answering Affidavit and the Replying Affidavit were set. The effect of this Interlocutory Application was that the Respondents (Applicant in the Interlocutory Application) wanted the court to declare invalid the permit that was granted by the Road Transportation Appeals Board.
- [6] The matter was then postponed to a later date. The Respondents then filed a Notice to Amend the Interlocutory Application of the 28th March, 2019 without necessarily abandoning the Interlocutory Application. The effect of the Amendment is to add the prayer for the review of the decision of the Road Transportation Appeals Board. It is necessitated by the fact that there was non adherence to procedure stipulated in the Act when the Appeals

Board granted the permit to the Applicant. The Applicant is opposing the Amending Notice and this is the subject of the present Application.

APPLICATION TO AMEND

The Respondent's case

[7] In support of its Notice to Amend the Respondents state that in the main Application, an Application for a declaration that the permit issued by the Road Transportation Appeals Board be declared invalid, has been filed. The Applicant has objected to this amendment on the basis that it seeks to amend the affidavit whereas the intention is to add prayers incorporating a review of the decision of the Appeals Board.

[8] The Respondents further argue that in terms of the Rules of Court, in particular Rule 28, an amendment of pleadings is allowed. This can be done at any time before judgment is issued. The court should be allowed to have access to the records of the proceedings of the Road Transportation Appeals Board so as to determine whether proper procedure was observed or not in the granting of the permit.

The Applicant's case

[9] The Applicant states that the Respondents are seeking to amend an Affidavit yet in terms of Rule 28(1) of the Rules of Court, an Affidavit cannot be amended. Furthermore the proposed amendment is not in terms of Rule 28(2) of the Rules of Court in that it does not specify the portions of the documents sought to be amended.

[10] The Applicant finally submits that the so called amendment is not an amendment but a fresh application for review disguised as an amendment.

THE APPLICABLE LAW

[11] Rule 28(1) states that “Any party desisting to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish further particulars of the amendment.”

[12] **Erasmus on Superior Court Practice JUTA Co at B1-177** discusses Rule 28(1) as follows:

“A pleading or document may be amended under sub-rule (1) only if it has been filed in connection with any proceeding. An Affidavit or

sworn statement is a document by means of which sworn evidence is put before a court in a written form. An amendment of an affidavit would amount to a change of evidence which has been given on oath and an amendment thereof cannot be allowed by way of mere notice under the sub-rule: a party who wishes to change his evidence given on oath must do so on oath, if necessary by way of a further affidavit.”

[13] On the issue of particularising, **Erasmus** (Supra) states at page Br-177 that:-

“The sub-rule makes it clear that the party desiring to amend must set out in his notice particulars of his proposed amendment. Unless particulars of the proposed amendment are so set out the party receiving the notice would not be able to object to the proposed under sub-rule (2) and (3).

COURT’S ANALYSIS AND CONCLUSION

[14] The Court wishes to observe that the pleading of the 17th April, 2019, which is the subject of determination by this court, is captioned “Notice to Amend.” This is done in terms of Rule 28 of the High Court Rules. The irony with this amendment is that it is a repeat of what is contained in the Respondents’ Interlocutory Application read together with the Answering

Affidavit. This become clear in paragraph 13 of the Notice to Amend where the Respondents state that “13 As earlier mentioned the grounds for review appear fully in the Founding Affidavit in particular paragraphs 9-18 which deals with non-adherence to procedure stipulated by the Act.” The court’s view is that the amendment is just not necessary as it is a repeat of what has already been said in the previous pleadings.

[15] Rule 28(1) states that where an Amendment is to be introduced whose effect is to amend an Affidavit, this should be by way of a further Affidavit. In this case, the Respondents have simply stated that they are filing a Notice to Amend without necessarily stating that it is a “Further Affidavit.” This has led to the Applicant objecting to same on the basis that you cannot amend an Affidavit as this violates Rule 28(1). The court’s view is that indeed the purported “Notice to Amend” is not a “Further Affidavit.” It is more of a “Notice to Amend” in the general sense. It is mere Amendment. The Respondents have not also particularised the areas of amendment in accordance with Rule 28 (2) and (3).

[16] Considering all that has been said above, the court comes to the conclusion that the proposed amendment should be dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a surname, written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT