IN THE INDUSTRIAL COURT OF SWAZILAND

Held at Mbabane

Case No. 21/2006B

In the matter between:

MICHAEL KOEKEMOER **Applicant**

And

USUTU PULP COMPANY T/A SAPPI USUTU
Respondent

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO: **MEMBER**

GILBERT NDZINISA: **MEMBER**

FOR APPLICANT: MUSA SIBANDZE (CURRIE & SIBANDZE ATTORNEYS)

FOR RESPONDENT:ADV. P. FLYNN (INSTRUCTED BY CLOETE/HENWOOD/ DLAMINI ASSOCIATED)

R U L I N G - 14. 03 .06

[1] The Applicant instituted proceedings before this court by way of Notice of Motion wherein it is claiming the payment of E140.163.76 as severance allowance from the Respondent.

[2] The Notice of Motion was brought before the court on the 3 February 2006. The Respondent did not file its Answering Affidavit. It however filed a notice to raise a question of law.

[3] The Respondent also filed an affidavit deposed to by Daniel Terblanche Kolver to support the question of law raised.

[4] The Applicant in response thereto file a notice in terms of Rule 30 of the High Court Rules for the setting aside the said affidavit as an irregular step or proceeding taken by the Respondent.

[5] The court is therefore presently being called upon to make a ruling in terms of the notice filed under Rule 30 of the High Court Rules relating to irregular proceedings.

[6] It was argued on behalf of the Applicant that the filing of the Affidavit by Daniel Terblanche Kolver be set aside as an irregular step. It was argued that the Respondent was expected to file an Answering Affidavit in response to the Applicant's Founding Affidavit. It was argued that the present affidavit of Daniel Terblanche Kolver only responded selectively to the issues raised by the Applicant's affidavit contrary to the rules of pleadings.

[7] On behalf of the Respondent, it was argued that the affidavit of Daniel Terblanche Kolver was only filed to support the question of law raised.

[8] The court was referred to numerous authorities by Mr. Sibandze on behalf of the Applicant. These cases were that of Ebrahim and Another v Georgoulas and Another 1992 *(2)* SA 151 9BG): Standard Bank of South Africa Ltd v RTS Techniques and Planning fPtv) Ltd and Others 1992 *(1)* SA 423 (T) and the case of Bader and Another v Weston and Another 1967 (1) SA 134 ©.

[9] In all these cases the courts had occasion to deal with the question of failure of the Respondent to file affidavits dealing with the merits, but only raising a preliminary point. In the Bader and Another case, Corbett J pointed out as follows at page 136:

> **" *... In my view they erred in not doing so. It seems to me that generally speaking our application procedure requires a respondent who wishes to oppose an application on the merits, to place his case on the merits before the court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point....*"**

[10] In this matter the Respondent's counsel pointed out to the court that they did riot intend to file any affidavit in answer to the merits. This application is therefore distinguishable from the cases that the court was referred to.

[11] In this matter the Respondent's counsel said they did not wish to address the merits of the case. In paragraph 2 of Daniel Terblanche Kolver's affidavit however, it is stated that: " *I have read the affidavit of Michael Koekemoer and I reply thereto as set out hereinafter", (my* emphasis).

[12] Furthermore, in paragraph 6.2.1 of his affidavit, Mr. Kolver responded to paragraph 4 of the Applicant's founding affidavit. Mr. Kolver also responded to paragraphs 9, 11 and 12 of the Applicant's founding affidavit.

[13] The Respondent clearly cannot reprobate and approbate. In court the Respondent's counsel said they did not intend to address the merits of the case, yet in the affidavit filed in court the Respondent did respond to the merits, albeit selectively.

[14] It seems to the court that once the Respondent decided to respond to the founding affidavit of the Applicant, it was bound to follow the rules relating to pleading. It was not entitled to respond thereto selectively, that is, to some

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paragraphs of the founding affidavit and not to the others. The affidavit by Mr. Kolver will accordingly be set aside.

[15] The court will accordingly make an order that the application by the Applicant in terms of Rule 30 of the High Court Rules should succeed with costs.

The members agree.

NKOSINATHI NKONYANE AJ
INDUSTRIAL COURT