IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 1/08**

In the matter between:

PALFRIDGE (PTY) LIMITED **Applicant**

and

SWAZILAND PROCESSING REFINING AND ALLIED WORKERS UNION **1st Respondent**

ALMON NXUMALO AND 40 OTHERS **2nd Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**B. MAGAGULA**
FOR RESPONDENT	**:**	**B. S. DLAMINI**

RULING ON POINTS IN LIMINE -28/01/2008

1. The Respondent has raised two preliminary points of law in this application, namely:

; the deponent to the Applicant's founding affidavit has

not disclosed that he has the necessary authority or mandate to depose to the affidavit on behalf of the Applicant company; and

; the Applicant has failed to make out a prima facie cause of action in its founding affidavit.

The latter point of law was abandoned during the course of arguments.

2. On the point regarding the deponent's mandate, there is a considerable amount of authority for the proposition that, where a company commences proceedings by way of application on notice of motion, it must appear that the person who makes the application on behalf of the company is duly authorized by the company to do so.

Some evidence should be placed before the court to show that the company has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the Applicant company are insufficient.

Mall (Cape) (Pty) Ltd v Merino Ko-operasie, Bpk 1957 (2) SA 347 (c) at 351.

Fairdeal Furnishers (Pty) Ltd v Standard Bank of Swaziland Ltd & Others SLR (1979-1981) 60 at 63.

3. As to the amount of evidence of authority required, each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the Applicant company which is litigating and not some unauthorized person on its behalf.

- see **Fairdeal Furnishers case at 63 D**.

4. A bare allegation of authority may suffice, particularly where the Respondent offers no evidence at all to suggest that the Applicant is not properly before the court.

African Land Investment Co Ltd v Newhoff & Others 1929 WLD 133.

Mall (Cape) case at 351-2.

5. Moreover, an allegation in express terms is not essential. The court may infer the necessary authority from the other facts and averments contained in the founding affidavit.

see **Harms: Civil Procedure in the Supreme Court at 182.**

6. The authority of the deponent must however be established from

the evidence contained in the founding affidavit. It is trite law that the court will not allow an Applicant to make out an essential element of its case in its Replying Affidavit.

Mauerberger v Mauerberger 1948 (3) SA 731 (c).

7. In the present matter there is no express allegation of authority, nor are any facts set out in the Founding Affidavit from which it may be inferred that the deponent Peter McCullough has been duly authorized to institute the proceedings on behalf of the Applicant company.

8. Counsel for the Applicant argues that it was not necessary for the deponent to state that he has the necessary authority or mandate to depose to the Founding Affidavit, because it is averred that he is the Chief Executive Officer of the Applicant. The Applicant in its replying affidavit argues that “by virtue of his position as Chief Executive Officer he has the authority to run the company and make certain statements that are personally known to him on behalf of the company.”

9. A Chief Executive Officer does not automatically have the authority to institute (or defend) legal proceedings on behalf of the company unless this authority has been generally delegated to him or he has been specifically authorized by resolution of the board of directors. The authority to run the company does not necessarily include

nor imply the authority to litigate in the name of the company.

Henochsberg on the Companies Act (3rd Ed) 808.

Fairdeal Furnishers case at 63 E.

10. The Applicant does not allege that its Chief Executive Officer has been generally delegated or specifically authorized by resolution of the company to institute legal proceedings on its behalf. A mere allegation that a deponent is the Chief Executive Officer of the Applicant company falls short of even the minimum evidence of authority required to appear in the Founding Affidavit, and does not give rise to an inference of authority.

11. The Applicant's counsel further argues that, if the court finds that an averment of authority should have been made in the Founding Affidavit, we should condone such omission – firstly, because the application was brought as one of urgency; and secondly, because the Industrial Court is not strictly bound by the rules of evidence and procedure which may apply in civil proceedings and may disregard any technical irregularity which does not result in a miscarriage of justice (see section 11 (1) of the Industrial Relations Act 2000).

12. The difficulty with this argument is that there is still no evidence of authority before the court. There is no allegation, even in the replying affidavit, that the deponent McCullough is generally authorized to institute legal proceedings on behalf of the Applicant, or that he was specifically authorized to institute the present application. No company resolution to this effect has been placed before the court. Even if the court were willing to condone the omission of an essential averment from the Founding Affidavit – and we would be most reluctant to do so in the absence of special and compelling circumstances - we certainly cannot do so where the essential averment is still lacking on the papers before us.

13. Counsel further submitted that, if the deponent's authority has not been established to the satisfaction of the court, we should allow the Applicant to file a resolution authorizing the proceedings at this stage. In our view, an application to supplement the Founding Affidavit with fresh evidence cannot be entertained at this stage. No resolution has been produced, and the matter has been argued on the papers before court. The Applicant had ample opportunity to file a resolution after the objection was raised, but this has not been done.

14. The Respondent's preliminary point of law must succeed.

The application is dismissed with costs.

The members agree.

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PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT