

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 567/2008

In the matter between:

**THEMBA BUTHELEZI & 57 OTHERS
APPLICANT**

And

PALFRIDGE LIMITED

RESPONDENT

CORAM:

D. MAZIBUKO:

JUDGE

A. M. NKAMBULE:

MEMBER

M. MTHETHWA:

MEMBER

FOR APPLICANT:

B.S. DLAMINI

FOR RESPONDENT:

L.R. MAMBA

JUDGMENT - 11TH JUNE 2010

Exception, Applicants' claims vague and embarrassing, Notice to remove cause of complaint filed, Applicants failing to correct defect complained of, exception upheld, dismissal of the application with leave to institute fresh proceedings.

1. In the particulars of claim the 1st Applicant is described as Themba Buthelezi, an adult Swazi male of Manzini, District of Manzini. The 1st Applicant is joined by 57 (fifty seven) other Applicants hereinafter referred to as co-Applicants.

2. The Respondent is PALFRIDGE LIMITED, a limited liability company registered in accordance with the laws of Swaziland having its principal place of business at Matsapha, District of Manzini.

3. About the 18th November 2008 the 1st Applicant (Themba Buthelezi) and 57 others (Co-Applicants) instituted legal proceedings against Respondent. The claim against Respondent is based on allegation of unfair dismissal arising from a contract of employment which has since terminated.

4. The Respondent filed a notice of intention to oppose the application. About the 1st December 2008 the Respondent filed a NOTICE TO REMOVE CAUSE OF COMPLAINT and delivered a copy on the Applicants' attorneys the same day. Both the Applicants and the Respondent are legally represented in this matter. On the 12th December 2008 the matter was removed from the roll in order to give the parties a chance to exchange further pleadings.

5. In her Notice to Remove Cause of Complaint the Respondent raised a complaint which reads as follows;

"1. In the heading of the "Particulars of Claim" the matter is between "Themba Buthelezi and fifty seven (57) others".

2. In paragraph 2 it is stated that "the full names of the further applicants are contained in annexure TBI enclosed hereto".

3. Annexure "TBI" contains forty three (43) applicants and not fifty seven (57). It can therefore not be determined who the fifty seven (57) applicants are, where they reside and whether they have locus standi or not."

6. In the Notice the Respondent gave Applicants 14 (fourteen) days from date of service to remove the cause of complaint. This is sufficient time in terms of the High Court rule 23 (1) as read with Industrial Court rule 28 (a).

7. About the 25th February 2009 the Applicants filed and served on the Respondent an Amended Particulars of Claim.

8. On the 11th May 2010 the Respondent filed a Notice of Exception based on the same grounds as appears on the Notice to Remove cause of Complaint. The matter is before Court on the exception.

9. In the exception the Respondent has challenged the manner the Applicants have drafted the particulars of claim. The particulars of claim are also known as statement of claim in terms of Industrial Court rule 7 (4).

9.1. The Notice of Motion filed by Applicants is

accompanied by the particulars of claim. There is a document annexed to the particulars of claim marked **TBI**. Annexure **TBI** contains a list of 43 (forty three) names of persons. Next to each name there are dates of birth, employment and dismissal. There is also gross wages and employment capacity of each person in the list. According to the particulars of claim annexure **TBI** contains a list of all Co-Applicants who joined 1st Applicant in the legal suit.

9.2. According to the heading on the application and the particulars of claim the 1st Applicant is Themba Buthelezi. Mr Buthelezi is joined by 57 (fifty seven) Co-Applicants.

10. The Respondent's first complaint is that whereas in the pleadings she is being sued by Themba Buthelezi (1st Applicant) and 57 (fifty seven) others, in reality the 1st Applicant is joined by only 43 (forty three) Co-Applicants. There is no explanation in the pleadings as to what has become of the missing 14 (fourteen) Co-Applicants. The Notice of Motion as well as particulars of claim is defective in as far as 14 (fourteen) missing Co-Applicants are concerned.

11. The Respondent's second complaint is that the 43 (forty three) names that are listed in annexure **TBI** are not properly introduced in the pleadings. The 43 (forty three) names are not listed in any particular order. There is no indication for instance, as to who is the 2nd, 3rd, 14th, 19th, 28th, 47th, 56th or any subsequent Applicant other than the 1st Applicant. The Respondent is unable to ascertain the hierarchy in which the Applicants are supposed to be

addressed in the reply or any subsequent pleadings. The Respondent is not entitled to arrange the Co-Applicants in any numerical order in her pleadings, the order should appear on the particulars of claim.

12. A third complaint filed by Respondent is that the particulars of claim fail to disclose where the Co-Applicants reside and whether or not they have *locus standi* to sue or be sued.

13. The Applicants presumably realised the defects complained of in their pleadings. On the 25th February 2009 the Applicants filed an amended particulars of claim. The amended particulars of claim are drafted in the same manner as the original particulars word for word. Attached to the amended particulars is another annexure also marked **TBI**. To avoid confusing this annexure with **TBI** that is attached to the original particulars of claim, the Court shall refer to the annexure s as original **TBI** and amended **TBI** respectively. Though the particulars are the same, the annexures are different.

14. The amended **TBI** contains a list of names of 42 (forty two) persons. Next to each name there are dates of birth, employment and dismissal. There is also gross wages and employment capacity of each person in the list. According to the amended particulars of claim the amended **TBI** contains a list of all the Applicants other than Themba Buthelezi (1st Applicant). The list of 42 (forty two) names in the amended **TBI** is grouped differently from the list on the original **TBI**.

15. In making the amendment, the Applicants did not follow

the procedure laid down in rule 28 (1), (2) and (3) of the High Court rules. The Applicants did not give notice to the Respondent of their intention to amend. As a result the Respondent did not have the 10 (ten) days notice period provided for in rule 28 (2) to decide on whether or not to object to the proposed amendment. If there is an objection the Respondent is entitled to make it in writing within the 10 (ten) day period. The Applicants simply went straight to file an amended particulars of claim and by-passed the provisions of rule 28 (1), (2) and (3) aforementioned. That anomaly was brought to the attention of the Applicants' Counsel by the Court. The Applicants' Counsel submitted that the parties had consented to by-passing the provisions of rule 28 (1), (2) and (3).

- (a) The Court was not called upon to decide whether or not the parties can lawfully by-pass the provisions of the rule in question. The matter before Court, being an exception, can still be decided without the need to delve into the legality or otherwise of by passing the High Court rule 28 (1), (2) and (3) by consent or otherwise.
- (b) Subsequent to the filing of the amended particulars of claim the Respondent filed an exception on the same grounds as embodied in the Notice to Remove Cause of Complaint. The Court is called upon to dismiss the Applicants' claim on the basis of the exception. The exception is opposed by the Applicants.

In terms of the High Court rule 18 (4) the Applicants are required to provide material facts with sufficient particularity in the Notice of Motion and Particulars of Claim in order to

enable the Respondent to plead thereto. The identity of the Applicants and their full particulars (description) including their physical addresses are material terms that ought to appear clearly on the face of the Applicants' pleadings.

18.1 In the original and amended particulars of claim, the Co-Applicants are listed in a separate page for convenience sake. What the Respondent is complaining about is that the annexure that should list all the Applicants has not done so but has listed some and has omitted others. In the amended particulars there are 42 (forty two] Co-Applicants instead of 57 (fifty seven). The outstanding 15 (fifteen) Co-Applicants do not appear anywhere in the particulars of claim.

18.2 According to Respondent, the notice of application and the amended particulars of claim are vague in as far as the missing Co-Applicants are concerned. There is no information regarding the identity of the missing Co-Applicants. The Respondent argues that she is embarrassed in that she does not know how to plead to an unknown Co-Applicant and in respect of an unknown claim.

19. The Court observes that an application before Court cannot exist in the absence of an Applicant. Since the 15 (fifteen) Co-Applicants are missing in the particulars of claim, that would mean that they are not Applicants before Court. Their claim is also not before Court. The Respondent cannot be called upon to answer a claim which is not in the pleadings. The Respondent is correct in arguing that the Applicants' claim is vague and embarrassing in as far as the missing 15 (fifteen) Co-Applicants are concerned. The Respondent does not know what case she has to answer.

That is a cause for embarrassment. The notice of application as well as the particulars of claim is vague in that it refers to 57 (fifty seven) Applicants, yet 15 (fifteen) of those Applicants are not mentioned in the particulars of claim at all.

20. The Court notes that the defect that appears in the amended particulars existed also in the original particulars. The Applicants were given a chance to amend their pleadings in order to remove the defects complained of. The Applicants have failed to remove the defects. The exception in respect of the first complaint filed by Respondent is properly taken and is accordingly upheld.

21. The second complaint raised by Respondent concerns failure to introduce Co-Applicants in hierarchical order in the particulars of claim from the 2nd Applicant to the last. Each Applicant must be individually identified and have his/her claim addressed separately from the claims of the other Applicants.

22. The particulars of claim allege that the Co-Applicants were employed by the Respondent on various dates, in various capacities and were similarly dismissed by Respondent in various dates. It is further alleged that the dismissal was unfair hence the Applicants claim relief (compensation) for unfair dismissal.

22.1. The Respondent is entitled to address the claims of each and every Applicant individually each on its merits. Each Applicant must of necessity be identifiable independently of the other Applicants,

22.2. In the amended **TBI** the Co-Applicants are grouped together in no particular order. The Court agrees that such pleading is bad in law, vague and embarrassing to the Respondent. The Respondent is entitled to know for instance who 3rd Applicant is and be able to identify him from any other Applicant. While it is commendable for Co-Applicants to be listed in a separate annexure (**TBI**) for the sake of convenience, the particulars of claim must comply with the rules of pleadings. The Court finds that the failure to list in numerical order the Co-Applicants results in the Applicants' pleadings being vague and embarrassing. The Court finds that the exception has been properly taken in respect of the second complaint raised by the Respondent and is accordingly upheld.

23. A third complaint argued by Respondent was that the particulars of claim do not disclose the physical addresses of the Co-Applicant and whether or not they have *locus standi*.

23.1. In paragraph 2 of the particulars of claim, it is stated that the Co-Applicants are all adult persons residing in different areas in the Kingdom of Swaziland. There is a legal presumption that an adult person has legal capacity to sue or be sued (*legitima persona standi in judicio*). The legal disability of married women that existed in the common law regarding *locus standi* has since been superseded by sections 20 (1) and (2) and 28 (1) of the Constitution of Swaziland Act No. 1 of 2005. This complaint by Respondent has no merit. Since the Co-Applicants are described as all adults, that means they all enjoy *locus standi in judicio* to sue and be sued whether they be male or female.

23.2. The physical address of the Co- Accused have not been stated save to mention that they reside in different areas in Swaziland. It is not enough to state that the Co-Applicants reside within the Kingdom of Swaziland. The pleadings must state the physical address of each and every Co-Applicant within Swaziland. The industrial Court rule 7 (4) (a) state as follows;

"The statement of claim shall contain:-

(a) the names, description and addresses of the parties to the application;"

Failure to comply with the legal requirement to plead the physical addresses of the Co-Applicant may result in the Respondent failing to identify some or all of the Co-Applicants referred to. That may cause embarrassment on the Respondent. However failure on the Applicants' part to plead their physical addresses does not necessarily result in embarrassment on the part of the Respondent. The Respondent must show that owing to the defect in the pleadings the Respondent is unable to identify the particular Applicant mentioned. Thus the Respondent is unable to deny or admit the allegations made. The Respondent has not stated in respect of which Applicant is the Respondent embarrassed. However in light of the Court's finding above regarding the first and second complaint which was raised by Respondent, it may not be practical at this stage for Respondent to argue this point with sufficient detail. The court makes no finding concerning the Respondent's third complaint.

24. For reasons stated above the Court finds that the exception is well taken. The Court orders as follows;

(a) The claims filed by the Co-Applicants are hereby dismissed. The claim of the 1st Applicant (Themba Buthelezi) is not affected by the exception.

(b) The Co-Applicants are granted leave to file fresh claims.

(c) The Respondents' costs shall be paid by the Co-Applicants jointly and severally, the one paying the other to be absolved.

The members agree

DUMSANI MAZIBUKO

JUDGE OF THE INDUSTRIAL COURT