IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE No. 2959/97

IN THE MATTER BETWEEN

ROYAL SWAZILAND SUGAR CORPORATION LIMITED t/a SIMUNYE	APPLICANT
AND	
SWAZILAND AGRICULTURAL AND PLANTATION WORKERS UNION	1st RESPONDENT
ANDREW MAMBA	2nd RESPONDENT
RAPHAEL MATSEBULA	3rd RESPONDENT
JOSEPH MAMBA	4th RESPONDENT
RUTH NYONI	5th RESPONDENT
MELVIN DLAMINI	6th RESPONDENT
MANDLA MKHALIPHI	7th RESPONDENT
JOHNSON LUKHELE	8th RESPONDENT
PHILEMON ZULU	9th RESPONDENT
The employees of the applicant participating in the current strike action further respondents	
Coram :	Dunn J.
FOR THE APPLICANT :	MR. D. SMITH
FOR THE 1st TO 9th RESPONDENTS :	MR. P. DUNSEITH

JUDGMENT

12th DECEMBER 1997.

On the 14th October 1997 the applicant filed an ex parte application under a certificate of urgency, seeking the following relief against the respondents-

2. That the respondents he and are hereby interdicted and restrained from:

2.1 Instigating, promoting, participating in, and/or inciting unlawful strike

action and continuing with the unlawful strike action

2.2 massing and/or picketing in any manner contrary to the provisions of the Industrial Relations Act

2.3 intimidating, harassing, threatening, assaulting and/or preventing employees of the applicant from going to work

2.4 obstructing applicant's vehicles, hindering the passage of any vehicles on applicant's premises or in anyway interfering with the applicant's vehicles

2.5 causing damage or threatening to damage any of the applicant's property

3. That insofar as it may be necessary to serve notice of these proceedings on each and every one of the respondents, that such notice be given by substituted service by serving this application on the first respondent by telefax at the offices of the first respondent.

4. That the sheriff and/or his lawful Deputy for the District of Siteki in conjunction with the Royal Swaziland Police be authorised and directed to take all such steps as may be necessary to maintain law and order and to allow the applicant to exercise its lawful right to conduct business and to allow the employees of the applicant to exercise their right to work without threats, intimidation or other unlawful acts against them, and in order to give effect thereto, authorising and directing the Royal Swaziland Police to remove and/or take into custody any of the respondents Who transgress this order.

5. That leave be granted to effect service of any order granted pursuant hereto on the respondents by:-

5.1 effecting service of the application and order on anyone of the shop stewards or any member of the respondent's Branch Committee at the applicant's premises

5.2 displaying any order granted in prominent places especially on notice boards in and around the said premises:

5.3 addressing any gathering or persons contrary to the provisions of this order (sic) using such amplification equipment as may be required advising them of the grant of the order and that copies thereof are available at a convenient place on the premises.

6. That the first respondent be ordered to pay the costs of these

proceedings.

The order that was granted is endorsed as follows in the Judge's file –

A rule nisi is to issue in terms of prayers 2, 3, 4, 5 and 6 of the Notice of Motion. Prayer 2 to have immediate effect. The rule returnable on the 24/10/97.

There is no indication in the court file as to how and when service of the order was effected on the respondents.

A notice of intention to oppose confirmation of the rule was filed simultaneously with answering affidavits by the 1st to 9th respondents, on the 29th October 1997. In the interim, the rule had been extended to the 7th November and thence to the 14th. The applicant filed a replying affidavit on the 11th November. On the 17th November, the 1st to 9th respondents filed an application for the striking out of certain paragraphs, passages and annexures from the applicant's replying affidavit on the grounds that the allegations and facts set out therein –

1. constitute new matter which should have appeared in the applicant's founding affidavit; and/or
2. constitute new matter which is irrelevant;
3. are calculated to prejudice the respondents and are vexatious.

The present proceedings relate to the application to strike out which is opposed by the applicant.

The law to be applied in applications of this nature has been the subject of numerous decisions of the courts of the Republic of South Africa, which have been followed by this court. The general rule emerging from these decisions is that all necessary allegations must appear in the founding affidavit and that an applicant will not (save in exceptional circumstances) be permitted to make out or supplement his case in a replying affidavit . An applicant must generally speaking stand or fall by his founding affidavit and the facts alleged therein and cannot introduce for the first time in his replying affidavit facts or circumstances upon which he seeks to found a new cause of action.

In the case of MAUERBERGER v. MAUERBERGER 1948 (3) SA 731 Searle J stated at 732-733

It is quite clear that in notice of motion proceedings an applicant must in his or her suppporting affidavit set out fully his or her cause of action. It is not for the applicant to simply make general allegations,

and when those allegations are dealt with in reply to come forward with replying affidavits giving details supporting the general allegations originally set out in the affidavit supporting the notice of motion.....It is clearly settled law that in replying affidavits an applicant is not allowed to set forth details of allegations which should have appeared in the original affidavit supporting the notice of motion.

In BAYAT AND OTHERS v. HANSA AND ANOTHER 1955(3) SA 547 Caney J stated at 553 D:

.....the principle which I think can be summarised as follows.....that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.

In KLEYNHANS v. VAN DER WESTHUIZEN, N.O. 1970 (1) SA 565 De Villiers J. stated at 568 E - G:

It is trite law that an applicant should set out in his petition or notice of motion and supporting affidavits a cause of action and, since in application proceedings the affidavits constitute not only the pleadings but also the evidence, such facts as would entitle him to the relief sought. Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion.....but may do so in the exercise of its discretion in special circumstances.

In TITTY'S BAR & BOTTLE STORE v. A. B. C. GARAGE & OTHERS 1974 (4) SA 362 Viljoen J stated at 368 H :

It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court.....In my view this practice still prevails.

Swaziland cases in point are MAZIBUKO v. DICKIE N.O. 1963-1969 SLR 106;FAIRDEAL FURNITURES (PTY) LIMITED v. DLAMINI 1982-1986 SLR 6 at 8A and SOMMERICH v. COMPUTRONICS LIMITED 1982-1986 SLR 511 at 513 C.

As indicated in some of the judgments referred to, this rule is not absolute. In the case of SHEPHARD v. TUCKERS LAND AND DEVELOP. CORP. (1)

1978(1) SA 173 Nestadt J stated at 177H :

It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances.

The head note in the case of BEACK & CO SA (PTY) LTD v. VAN ZUMMEREN AND ANOTHER 1982 (2) SA 112 reads in part as follows –

Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit the approach of the Court should nevertheless always be to attempt to consider substance rather than form in the absence of prejudice to any party.

In DAWOOD v. MAHOMED 1979 (2) SA 362 Page A J, as he then was, stated at 364 D - F :

It has been equally frequently stated that this rule of practice, despite its undoubted cogency, does not operate so as to preclude the Court from permitting the introduction of further affidavits when considerations of justice and fairness to both parties dictate that this should be done. This rule, as also the rule that the Court will not ordinarily receive more than three sets of affidavits, remains subject to the discretionary power of the Court to allow a departure therefrom when the facts of the case warrant it and the mere fact that the matter sought to be introduced in the new affidavit should properly have been included in the founding affidavit and not in the reply does not negative the existence of this discretionary power.

In the TITTY'S BAR case supra, at 369A Viljoen J stated –

It lies, of course in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.

In the case of POSEIDON SHIPS AGENCIES v. AFRICAN COALING & ANOTHER 1980 (1) SA 313 Broome J stated at 315 G :

It is true that in certain circumstances it would be unjust to confine an applicant to the contents of his launching affidavit. An example of further highly relevant facts coming to light later, and being introduced

despite objection, is to be found in Registrar of Insurance v. Johannesburg Insurance Co Ltd (1) 1962 (4) SA 546 where , in an application made to the Registrar of Insurance for the liquidation of the respondent insurance company, a report prepared by a firm of accountants was admitted. Another example of the Court authorising an applicant to introduce new material in reply is to be found in Kleynhans v. Van der Westhuizen N.O. 1970 (1) SA 565 at 568E where the Court considered that, as the ramifications of the respondent's affairs were extensive and complex, it was impossible for the applicant to have had all the facts at his disposal before he launched sequestration proceedings. See also Titty's Bar and Bottle Store (Pty)Ltd v. ABC Garage and others 1974 (4) SA 362 at 369 A - B.

But none of these cases go the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for applicant to make out a prima facie case in its founding affidavit.

I turn now to the founding affidavit. The affidavit was deposed to by the Managing Director of the applicant on the 14th October 1997. The first respondent is described as an industry union which has been granted recognition in respect of the unionisable employees of the applicant in terms of section 36 of the Industrial Relations Act of 1990 (now section 43 of the Industrial Relations Act of 1996).The second respondent is described as the chairman of the Executive Branch Committee of the first respondent. The third to ninth respondents are described as committee members of the first respondent. There is no indication that they are being cited in thier capacities as such.

The folllowing apppears from paragraph 17 to paragraph 24 under the heading " FACTS "-

A national stayaway was declared recently which was due to commence on the 13th October 1997.

However on the 13th October 1997 approximately 70% of the employees of the applicant were at work. Today I estimate that less than 20% of the work force is at work because a number of them have been intimidated and prevented from going to work by members of the first respondent although they wished to go to work.

Frm 07h00 this morning I have been receiving reports from senior managers regarding the seriousness of the situation.

When the agricultural manager Mr. W H Street arrived at Ngomane Village at approximately 07h15 the road from the agricultural offices to the village was blocked with stones and there were a number of rocks on the road between the road block and security offices. Approximately

150 striking workers had congregated opposite the church and were toyi-toying, singing and shouting.

There were approximately 250 employees wailing at the security offices to go to work but were afraid to do so because of the actions of the 150 striking workers congregated opposite the church.

Later at approximately 08h00 the striking workers who had congregated around the church were addressed by Mr Zulu one of the shop stewards. The managers and policemen in the vicinity of security were shouted at and stones were thrown at them. Mr Street was present during this incident.

At around 10.30 a.m. today Mr Jele, a Security Manager received a report that a group of striking

workers had entered a house in Lusoti Village and had beaten up a number of employees. The employees were severely beaten up and had to be taken to the clinic for treatment.

Having regard to the time constraints under which this application has been prepared I pray for the leave of court ;

1. To allow service of this application by facsimile to the first respondent's offices at the address set out above ;
2. To allow the applicant to file such further supplementary and confirmatory affidavits as may be necessary in due course.

A signed statement by an area manager, Mr E Nsibandze, is annexed hereto marked MRB2 which sets out more fully the events which took place today. It has not been possible to prepare an affidavit due to time constraints. An affidavit will be filed in due cause.

These allegations constituted the basis on which the relief was sought. The annexure MRB2 is an unsworn statement by E. Nsibandze dealing with the confrontation between employees who wished to work and "striking workers" on the morning of the 14th October. There is no reference in the statement to the first to ninth respondents.

It is quite obvious from a reading of the " facts" set out in the founding affidavit that no cause of action whatsoever has been established against the first to the ninth respondents. There is no indication as to who declared the national stayaway or as to what part, if any, the respondents had in such declaration. There is no allegation that the first respondent called on its members to join in the stayaway or that members of the first respondent were acting as such in the alleged prevention of employees of The applicant from going to work. The reference to the conduct of " striking workers" in the founding affidavit and annexure MRB2 in no way suggests responsibility for the stayaway or

strike on the first to ninth respondent . The paragraphs setting out the facts relied upon for the relief do not in my view constitute a cause of action by the applicant against the first to ninth respondents. It is quite clear that the applicant has, since the filing of the answering affidavits, realised the deficiencies of the founding affidavit. It is this realisation which has brought about the filing of the lengthy and detailed replying affidavits .

It is not necessary for me to go into a detailed analysis of the various aspects of the replying affidavit and annexures which the respondents seek to have struck out. The offending material has been carefully selected and set out in the application by the respondents. It is quite clear from a consideration of the replying affidavits that the applicant is for the first time, attempting to make out a case for the relief sought against the respondents. Mr Dunseith's reasons and submissions for the striking out are cogent and compelling.

Mr. Smith has in his argument which was supported by relevant authority, urged the Court to consider the substance rather than the sequence and form in which the two sets of affidavits were filed. I have considered the authorities referred to by Mr. Smith which seek in effect to avoid the ugly spectacle of law triumphing over justice . I am not, however, satisfied that these authorities are in point in a case such as the present, where the founding affidavit is totally defective.

The application to strike out is granted as prayed with costs.

B. DUNN.

JUDGE.