

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 130/98

In the matter between:

SIMON MVUBU APPLICANT

And

NGWANE MILLS (PTY) LTD RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

RULING

The Applicant has filed a Notice of Motion to amend his application in the following manner:

1. " Replacing paragraph four of the Notice of Motion with the following :

"prohibiting the Respondent from preventing the Applicant from carrying on with the activities of the union known as the Swaziland Manufacturing and Allied Workers Union in the undertaking of the Respondent.

2. Adding a new paragraph 5 as follows : further and or alternative relief.

3. Adding a new paragraph 6 as follows: costs".

The Respondent opposes the proposed amendments on the grounds that the amendment sought attempts to introduce a new cause of action which is not substantiated by any allegations in the Founding Affidavit and the Respondent has not been able to

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reply to same in its opposing Affidavit. Further, the Respondent states that no averments in the Founding Affidavit support a prayer for costs in terms of Section 10 of the Industrial Relations Act.

Rule 10 (9) of the Industrial Court Rules provides that where these Rules do not make provision for the procedure to be followed in any matter before the Court, the High Court Rules shall apply to proceedings before the court with such qualifications, modifications and adaptations as the President may determine.

The rules of this Court do not provide for the amendment of Pleadings and Documents before it and therefore we have resorted to the High Court (Amendment) Rules, 1990.

Rule 28 (8) provides:

"The Court may during the hearing at any stage before judgement grant leave to amend any pleading or document on such terms as to costs or otherwise as to it seems fit".

In this case, pleadings have been closed and when the matter came before former Judge of this Court, Justice Parker on the 14th July, 1998 he made an order as follows:

"The Applicant's prayer in paragraph one shall be determined by this Court. But in our view paragraph two and three thereof cannot be entertained by the Court. The Respondent is to file papers in response to paragraph one of the Applicants's prayer on or before the 30th July, 1998".

Prayer one of the Notice of Motion reads as follows :

"Application will be made on behalf of the Applicant for an order in the following terms :

1. Declaring the written warnings issued against the Applicant by the letter of 24th October, 1997 unlawful and invalid and setting the said warning aside."

The Respondent was ordered by this Court to specifically file a reply addressing this particular prayer. On the 31st July, 1997 the Respondent filed their Replying Affidavit in compliance with the order of this Court.

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It is now common cause that the warnings issued against the Applicant by the letter of the 24th October, 1997 have since lapsed and no longer hold and therefore this application has been overtaken by events.

The Applicant however now seeks to amend the application in the manner stated to keep the matter alive as it were.

The question we are called upon to answer is whether this amendment is permissible in the circumstances alluded to here before.

The court has a discretion in terms of the High Court Rules to allow an amendment anytime before judgement. This is the case even if the amendment can be said to introduce a cause of action which did not exist when the application was launched, though we do not think this is the case here. The test to be applied in this case is whether the amendment will prejudice the Respondent in a manner that cannot be remedied by way of filing Supplementary Pleadings and/or Affidavit or by way of costs.

It appears to us the new prayer is inextricably intertwined with prayer one which is now said to have been overtaken by events.

We dare say that the Founding Affidavit clearly details the alleged harassment and attempts to obstruct the Applicant from engaging in Union activities which the introduced amendment seeks this court to restrain and these averments have been extensively met in the replying affidavit. If the allegations have not been responded to adequately this would be remedied by way of filing supplementary affidavits with no real risk of prejudice to Respondent's case.

We are fortified in our finding by the views of Nathan CJ. as he then was in the case of MOTSA v CARMICHAEL INVESTMENTS (PTY) LTD, 1979 - 1981 S. L. R. 166 at 169.

In this case the Respondent had objected to the filing of Supplementary Affidavits by the Applicant on the basis that they introduced a cause of action that had not occurred at the time of institution of the application. The learned judge stated :

"There can be no prejudice to the Respondent in the permitting of Supplementary Affidavit to remain on the papers. Even if this can be said to introduce a cause of action which did not exist when the application was launched -and I am by no means certain that this is the case- the court has a discretion in the matter (See De Bryn v Centenary Finance Co (Pty) Ltd 1977 (3) SA 37 (T) at 42.

It appears to us reasonable that this discretion in the circumstances of the present case be exercised against the Respondent.

4 In the final analysis we will make the following order :

- (i) The application to amend is allowed.
- (ii) The Respondent is granted leave to file any further replies.
- (iii) Applicant to pay costs in respect of any further papers filed by the Respondent pursuant to this amendment.

NDERI NDUMA PRESIDENT OF THE INDUSTRIAL COURT