

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 57/2001

In the matter between:

PARSONS TRANSPORT (PTY) LTD

APPLICANT

And

FLORAH DUBE

1ST RESPONDENT

DANIEL MANTIMAKHULU

2nd RESPONDENT

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO; MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. D. MAZIBUKO

FOR 1st RESPONDENT: NO APPEARANCE

FOR 2nd RESPONDENT: MR. N. MTHETHWA

RULING ON POINT OF LAW

12.09.06

[1] In this matter the applicant applied to the court on an urgent basis for

an order stopping a sale in execution of the applicant's goods.

[2] An interim order staying the intended sale in execution was granted by the court on 15.08.06.

[3] In the meantime the 2nd respondent has filed an opposing affidavit and the applicant has filed its replying affidavit.

[4] The return date of the *rule nisi* was set for 29.08.06 when the matter came to court on that day however Mr. Mazibuko raised a point in *limine*, He argued that the application was being opposed by the wrong person, and that in essence the application is unopposed as the 2nd respondent had not filed any affidavit. He further argued that there was no court order authorizing Mr. Mthethwa to file documents in court on behalf of the 2nd respondent.

[5] Mr. Mthethwa argued to the contrary that there was no irregularity on the papers before the court. He argued that he deposed to the opposing affidavit because the facts he deposed to were within his personal knowledge.

[6] The court was referred to a number of authorities, each party supporting his submissions on the point.

[7] Mr. Mthethwa referred the court to the cases of **MALL (CAPE) PTY LTD. V. MERINO KO-OPERASIE BPK 1957 (2) S.A. 347 (c); GANES AND ANOTHER V. TELECOM NAMIBIA LTD 2004 (3) S.A. 615**. These cases deal with the question of authority for a person to institute and prosecute motion proceedings and also to depose to an affidavit.

[8] In the Ganes and another case Streicher J.A, held as follows at page 624:-

"The deponent to an affidavit in motion proceedings need not be

authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized

[9] In the present matter the authority of Mr. Mthethwa to appear on behalf of the 2nd Respondent is not being questioned. Mr. Mazibuko's argument was that Mr. Mthethwa has no authority to give evidence on behalf of somebody else.

[10] As already pointed out by Streicher 3.A. in the Ganes and Another case, a deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to an affidavit.

[11] This is also the position in Swaziland and it is trite law. An affidavit is nothing but a sworn statement. Any person who has knowledge of the facts in any particular case can depose to an affidavit.

[12] This position of the law was also confirmed in the local case of **3. K. MASEKO & COMPANY (PTY) LTD v. LUNGILE DLAMINI AND OTHERS (H.C.) CASE NO. 3629/05** (unreported), to which the court was referred to by Mr, Mazibuko.

That case was dealing with the question of authority to initiate legal proceedings. At page 5 thereof Ebersohn 1 held that:-

"I find that the legal position in Swaziland is the same as in South Africa as set out by Ogilvy Thompson J.A. in the Meerlust matter and that is that, ordinarily, a deponent to an affidavit do not need anybody's authority to depose to the affidavit but where a deponent on behalf of an artificial body initiates any legal proceedings or make an affidavit on behalf of the artificial body and where his authority to do so is challenged, it is incumbent upon the deponent to prove his authority by producing the appropriately worded resolution empowering him,"

[14] In this matter however. Mr. Mthethwa is not giving evidence on behalf

of the 2nd respondent. He is giving evidence on facts that are within his own personal knowledge. He is the attorney that was handling the matter from the beginning. His office is the one that sued out the writ of execution that is now the subject matter of this application.

[15] The litigants in this matter are already known. The present application was brought under the same case number as the initial application instituted by the 2nd respondent. The court therefore is of the view that the affidavit filed and deposed to by Mr. Mthethwa was sufficient for the purposes of this application, and that the failure by the 2nd respondent to file an affidavit did not constitute an irregularity.

[16] The point in *limine* raised is accordingly dismissed.

No order for costs is made.

NKOSINATHI NKONYANE AJ
INDUSTRIAL COURT