IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 2207/94

In the matter between:

SWAZILAND COMMERCIAL AND ALLIED WORKERS UNION

and

MHLANGANO VILAKATI — Respondent

CORAM: — Hull, C.J.
FOR THE APPLICANT — Mr. L.R. Mamba
FOR THE RESPONDENT — Mr. Dunseith

Judgment on costs
(20/3/95)

Mr. Dunseith asks for costs to be awarded in favour of Mr. Vilakati against Mr. Mango de bonis propiis and on the attorney and client scale. He applied formally for such orders at the hearing; Mr. Vilakati had also indicated the intention to do so in his answering affidavit.

The basis for the application, as it was first put, was twofold. It was contended that the union itself should not have to bear the expenses of an unauthorised application - hence the appropriateness of an order against Mr. Mango personally. It was also contended that in procuring a rule nisi with interim effect, Mr. Mango had been less

than frank with the court and had indeed concealed relevant facts wilfully, so that an order for costs on the higher scale was appropriate.

Counsel were agreed that, in principle, a court may in an appropriate case order costs de bonis propiis on an attorney and client scale: see Webb and Others v. Botha 1980 (3) SA 666, cited by Mr. Dunseith.

Both are special orders, however, and will not be made readily.

The principle governing costs de bonis propiis applies only where a person acts or litigates in a representative capacity. The basic notion behind the award is "material departure from the responsibility of office", including absence of locus standi: A.C. Villiers, Law of Costs (Second Edition), at pages 162 and 163.

It is also said that in the case of a person acting in a fiduciary capacity there must be good reasons for the order, such as improper or unreasonable conduct: see Vermaak's Executor v. Vermaak's Heirs 1909 T.S. 679. This includes negligence (or at least serious negligence) in the conduct of litigation but errors of judgment are not sufficient reason. The fairness or unfairness of proceedings brought honestly should not be scrutinised too closely, and the reasonableness of the representative's conduct should be judged by the point of view of a man of ordinary ability and not that of a trained lawyer: see Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa (Third Edition), at page 495.

The point of the order is to protect the representative's principal, not the opposing party. Mr. Vilakati is however a member of the union. It was also his case that he is chairman of its interim committee. In my view he has sufficient standing to seek such an order.

The factual allegations on which Mr. Dunseith sought the orders were set out in paragraph 7.3 - 7.16 in Mr. Vilakati's answering affidavit. However, only two really require consideration.

In the way in which the founding affidavit was expressed, it did as a matter of fact give a misleading impression. In paragraph 1, Mr. Mango stated that he was the secretary-general of the union and that he was duly authorised by the national executive committee to make the affidavit. There was also a clear implication that he was authorised to conduct the litigation on behalf of the union: he annexed to the affidavit the resolution of the committee purporting to invest him with that power, and of course that is what he proceeded to do.

The other thing that he did was to annex a copy of the constitution. On its face, this does each of the following things. It provides separately for general meetings and delegates' congresses. It provides for the election of office-holders at quadrennial delegates' congresses. It provides (inter alia) for the offices of president and secretary-general. It provides for a national executive committee, which includes such officers, and it sets out the functions and powers of that committee.

Except for the statements in paragraph 1 to which I have referred, and the annexed resolution and constitution, the founding affidavit does not seek to demonstrate the authority of the executive committee, or Mr. Mango's authority to conduct the proceedings.

In that respect, viewed objectively, the founding affidavit was misleading. There was undoubtedly an implication that Mr. Mango and the other members of the executive committee had been appointed and were holding office in accordance with the union's constitution. That was untrue. In fact, Mr. Mango's subsequent replying affidavit was also incorrect in this respect. In it, in paragraphs 6.2.2 and 6.2.3, he asserted that a quadrennial congress was held in April 1991, at which he was re-elected and the other members of the executive committee were elected. But it is evident, from the minutes and from his letter to the Commissioner of Labour that he himself annexed to that affidavit, that the purported elections in 1991 had been held in an annual general meeting and, further, that Mr. Mango was aware of this.

In consequence of the founding affidavit, Mr. Mango procured a rule nisi with interim effect at very short notice to Mr. Vilakati. The

latter, effectively, was given no time in which to respond at that stage. Thereafter he was obliged to defend proceedings in which on the very point, Mr. Mango was unable to establish his authority and that of his committee.

If the real position had been disclosed at the time when the rule nisi was granted, I do not consider that the court could properly have granted interim relief to the applicant on so urgent a basis. On the information before it, the court was being asked to grant urgent relief to a duly elected executive committee of a union against interference by an interloper, but that was not the truth of the matter.

The preparation and swearing of an affidavit are serious matters in which a high degree of care - even punctiliousness - must be exercised. A decision to institute legal proceedings is itself an important step which is to be considered with care (especially where the person initiating the action is acting as a representative or agent: see Ashley v. South African Prudential Ltd 1929 T.P.D. 283 at page 285 per Tindall J.)

Mr. Mamba submitted the application was not brought ex parte. He is correct, but for the reasons which I explained in Makhowe Investments (Pty) Limited v. Usutu Pulp Company Ltd (Civil Case No. 1961/94), I am of the view that the rule nisi with interim effect was obtained here effectively on an ex parte basis so that the strict rules of disclosure governing such applications were in principle applicable. In any event of course, every person who is involved in the conduct of litigation has a positive duty not to mislead the court wilfully. Failure to disclose a fact that might be material does not mean necessarily that a person has tried deliberately to mislead the court, but the duty not to do so - not to wilfully mislead the court - exists both in ex parte and inter partes proceedings. A breach of that duty may have, amongst other things, repercussions in costs.

There are nevertheless two reasons why in the present case I do not impute to Mr. Mango any calculated intention to deceive the court. In the first place, in the way in which the application for special

orders for costs was eventually argued, this feature of the case was not pressed. I think that is determinative. This is a civil dispute. The orders sought are exceptional, and it is not for the court of its own initiative to be assiduous in seeking to uphold such a claim.

In any case, I do not think myself that it is right to do so. Mr. Mango is a layman. The other real question which arises on the issue of costs is whether the letter of 29th November 1994 which was written by Mr. Vilakati to him, and was admittedly received by him, should have been disclosed in his founding affidavit. It may have been safer to annex it, but I do not consider that it can be said at all that he was wrong not to have done so. That letter in fact militates in his favour, and in favour of his executive committee. It is perhaps an indication that there was trouble within the union, and that indication is reinforced by the way in which Mr. Mango dealt with the letter eventually in his replying affidavit. He said - I take his statement at face value - that he and his colleagues "rightfully" and "contemptuously" ignored it. There may also be something of an indication of trouble in the fact that the letter was written on 29th November, the interim committee was elected on 4th December, and Mr. Mango's committee resolved on 6th December to act to restrain Mr. Vilakati "and/or his organisation".

It cannot be said, however, that the letter of 29th November put Mr. Mango or his committee on notice that the validity of their appointments was being challenged. To the contrary, the tenor of the letter is such as to accept the legitimacy of the committee. All that is really intimated, at most, is that they may be required to give an account of their stewardship.

Mr. Dunseith acknowledged (rightly in my view) that there is no evidence that the decision taken in general meeting on 4th December to replace the executive committee by the "interim committee" was ever conveyed to Mr. Mango and his colleagues.

It has not been shown that Mr. Mango and his colleagues had any reason (other than their failure to have careful regard to the requirements of the constitution) for believing that they were not duly appointed.

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On the evidence before me - as indicated by the letter of 29th November - there is reason for thinking they were not then regarded as former officer-holders who were intent on "holding over". The terms of the minutes of the general meeting held on 4th December (a copy of which was annexed in the answering affidavit) also indicated this, because one of the decisions taken at that meeting was to "suspend" the executive committee.

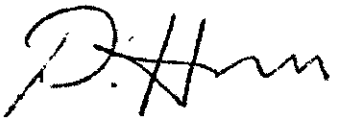
Although I have found on the merits that they were not validly holding their offices, I do think that it cannot be said properly that they are shown to have acted, calculatedly, without any semblance of authority at all. The evidence does not establish that they were challenged as to their authority before December 1994. While I do consider, for the reasons that I have already given, that in the way in which the founding affidavit was couched there was a very clear implication that Mr. Mango and his colleagues were holding office in accordance with the constitution, that conclusion does depend on an inference and I do think that it requires a degree of reflection to identify it.

The remaining question in my mind is whether Mr. Mango and his colleagues, while not acting dishonestly, were nevertheless in the way in which they wrongly assumed authority to bring their application sufficiently negligent to justify the special orders sought.

I was at first inclined to think that those orders should be granted, but, after hearing Mr. Mamba, my conclusion is that it would not be right to make either of them. I do think that Mr. Mango and his colleagues acted without due authority, but they had already held over in office for more than three years and, by the time they brought this application, the "interim committee" had not done anything itself by way of legal action to restrain them. In the circumstances, the application for special orders is declined. The costs will be on the

ordinary party and party basis, against the union itself in favour of Mr. Vilakati.

Order accordingly.



DAVID HULL
CHIEF JUSTICE