IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 1623/94

In the matter between:

HUMPHREY H. HENWOOD	APPLICANT
and	
MALOMA COLLIERY LIMITED	1ST RESPONDENT
ATTORNEY -GENERAL	2ND RESPONDENT

CORAM: DUNN J.

FOR THE APPLICANT: MR FLYNN
FOR THE 1ST RESPONDENT: MR KUNY
FOR THE 2ND RESPONDENT: MR MASUKU.

RULING ON RULE 6(25) APPLICATION
30TH SEPTEMBER 1994

The applicant is the registered owner of Farm Numbers 422 and 481 both situate at Maloma in the Lubombo district. The first respondent, a registered company, carries on business as a coal mine on the farms owned by the applicant. The first respondent first came onto the applicant's farms during 1989 following a prospecting agreement entered into between the first respondent and the Swazi Nation. The first respondent was subsequently granted a mining lease by the Ngwenyama on the 24th of June 1992. Installation of the necessary coal mining equipment commenced in about October 1992 and actual mining commenced in about July 1993.

In Swaziland, all rights in minerals vest in the Ngwenyama in trust for the Swazi Nation. Rights to mine and exploit minerals can only be granted by the Ngwenyama after consultation with the Mineral's Committee. See section 95 of the Constitution.

The Mining Act No. 5/1958 (the Act) provides some protection for the rights of a landowner over whose land the exploitation of minerals take place. Provision is made in the Act for matters such as the land owner's right to surface rental and compensation; the publication by the commissioner of Mines of Notices in the Government Gazette regarding applications for mining leases; the issue of a written notice to a landowner in respect of whose land a mining lease has been granted and the publication of a grant of a mining lease.

The applicant sets out in his affidavit that these provisions of the Act were not complied with prior to commencement of the mining operations. The applicant sought and obtained legal advice regarding these provisions and he sets out that he was advised as follows-

> 29. I then approached my attorney Peter Dunseith, and consulted him regarding my rights. He advised me that, although my rights as a private landowner are drastically curtailed by the Mining Act No. 5 of 1958, I am protected in certain respects, viz.
>
> 29.1 I am entitled to be paid a surface rental for the use of my land, the rate of the surface rental to be fixed by Minerals Committee;
>
> 29.2 I am entitled in terms of Section 12(1) of the Mining Act to receive notice of the intention of the First Respondent as the Mining Company to mine on my land;
>
> Such notice must be given before mining operations are commenced. See Section 48 of the Mining Act.

I have never received such notice.

29.3 the Commissioner of Mines is obliged in terms of Regulation 80 of the Mining Act to publish notice in the Government Gazette that application has been made for a mining lease. This is obviously to enable interested persons, especially affected landowners, to object to the mining lease being granted, or to make representations in respect thereof;

Such notice in the Government Gazette was never published;

29.4 the Commissioner of Mines is also obliged in terms of Regulation 47 of the Mining Act to serve a written notice on the owner of the land informing him that the Ngwenyama has granted a mining lease;

No such notice has ever been served upon me;

29.5. the Commissioner of Mines is also obliged to publish notice in the Government Gazette, as required by Regulation 80(2) of the Mining Act, that a mining lease has been granted;

This also was not done.

30. I am advised and I verify believe that these provisions of the Mining Act are peremptory and a condition precedent to the grant of a mining lease and/or commencement of mining operations as the case may be, in view of the serious curtailment of my rights as a private landowner by the granting of a mining lease.

In so far as the mining lease is concerned the applicant contends that it is invalid in as much as it was not signed before a Rotary Public as required by clause 2.1 of the lease. It appears from the applicant's affidavit that he obtained this advice prior to May 1993 and that he made numerous attempts to have his rights observed and the relationship with the first respondent regularised. He contends, in the circumstances, that the first respondent's presence and mining operations on his property are unlawful. He states at paragraph 44 -

> I am a peaceful farmer, and I have done everything in my power to negotiate an amicable arrangement with the First Respondent, whilst reserving all my rights. The First Respondent has made no effort to meet my wishes, or to resolve my complaints, and has merely delayed me with empty reassurances. Likewise, I have received no co-operation from the Commissioner of Mines, who has ignored his obligations in terms of the Mining Act. My patience has now run out.

The present application was launched and served on the respondent under a certificate of urgency on Friday the 16th September 1994 with notice that it would be heard at 9.30 am Wednesday 21st September. The relief sought by the applicant is for an order in the following terms-

(a) Waiving the usual requirements of the rules of court regarding notice and service of application in view of the urgency of the matter.

(b) Interdicting and restraining the First Respondent from continuing with mining operations upon the Applicant's farms, namely Farm No.s 422 and 481, situate in Lubombo District, Swaziland.

(c) Directing the First Respondent to vacate the Applicant's said farms within seven (7) days, failing which authorising and directing the Sheriff or his Deputy to evict the First Respondent from the said farms.,

(d) Costs of the application.

(e) In the event of this Honourable Court granting a rule nisi in terms of the above prayers, an order that Prayer (b) above shall operate as an interim order with immediate effect.

The first respondent filed an answering affidavit on the morning of the 21st, pointing out that given the nature of the application and the short notice of the hearing the first respondent was only able to deal with the question of the urgency of the application. Mr Masuku of the Attorney General's chambers appeared without having filed any papers citing the short notice for this and indicated that the second respondent would also argue the question of the urgency of the application.

Proceedings by way of application are governed by Rule 6 of the High Court Rules as amended. Rule 6(9) provides that every application other than one brought **ex parte** shall be brought on notice of motion as near as may be in accordance with Form 3 of the First Schedule. Rule 6(10) requires an applicant to appoint an address for service within five kilometres of the office of the Registrar and to set a day not less than five days after service of the application on the respondent "on or before which such respondent is required to notify the applicant in writing whether he intends to oppose such application and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than seven days after service on the respondent"

of the application. In terms of Rule 6(12) any person opposing the grant of an order sought in the application shall-

(a) file a written notice of his intention to oppose and appoint an address for service within five kilometres of the office of the Registrar;

(b) within fourteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit together with any relevant document.

Urgent applications are dealt with under Rule 6(25) (which is identical to rule 6(12) of the South African Rules) as follows-

(a) In urgent applications, the Court or Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as the Court or judge, as the case may be, seems fit.

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this Sub-Rule, the applicant shall set forth explicity the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course.

The provisions of Rule 6 which I have set out are peremptory.

There mere existence of some urgency does not permit an applicant to disregard the provisions of this Rule, for the Court is called upon to dispose of urgent applications in such manner and in accordance with such procedure" which shall as far as practicable be in terms of these Rules" The proper application of the corresponding South African Rule (6(12) has been the subject of numerous instructive decisions to which I was referred in the course of argument. In the case of **LUNA MEUBEL VERVAARDIGERS v MAKIN AND ANOTHER 1977 (4) SA 135 at 137** COETZEE J stated-

> " Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(d) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of departure from the norm, which is involved in the time and day for which the matter be set down".

In the case of **GALLAGHER v NORMAN'S TRANSPORT LINES (PTY) LTD 1992 (3) SA 500** FLEMMING DJP stated at 502-

> "The mere existence of some urgency cannot therefore justify an applicant not using form 2(a) of the first schedule to the Uniform Rules. The Rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned- and often that a rule nisi be sought. The applicant must, in all respects, responsibly strike a balance between the duty

to obey Rule 6(5) and the entitlement to deviate, remembering that that entitlement is dependent upon and is thus limited according to the urgency which prevails".

In **MANGALA v. MANGALA 1967(2) SA 415** the following was stated by MUNNIK J at 415 H-416A-

" The Rules make provision for the procedure to be followed in all applications. There is one Rule which provides a saving clause as it were and that is Rule 6(12) in terms whereof the court may, in certain circumstances, dispense with notice and certain formalities in urgent applications, but the Rule states that the applicant must in his affidavit or petition ' set forth explicity the circumstances which he avers render the matter urgent and the reasons way he claims he could not be afforded substantial redress at a hearing in due course'. These Rules have been devised for the smoother working of litigation and at the same time for the protection of litigants on both sides. Normally, therefore, compliance with the Rules means that the respondent in an application such as this would have a certain fixed period within which she should be entitled to signify her intention of defending the proceedings and of filing her affidavits and doing the things necessary for conducting a defence of the application. This is a right which she is given in terms of the Rules. Now, as I have said, provision, is made for the curtailment of this right but only when the provisions of Rule 6(12)(b) (quoted above) have in fact been complied with..

I turn now to consider the grounds relied upon by the applicant for urgency. These are set out as follows at paragraph 46 of the founding affidavit-

46.1. mine work is proceeding apace, and no provision has been made for security for rehabilitation and compensation; and no arrangement has been made for payment of surface rental;

46.2 my farming operations are being seriously prejudiced by the encroachment on my farms and the negligent disregard of the Respondents for my concerns;

46.3 I continue to suffer the hardships referred to in Paragraph 43 above on a daily basis;

46.4 it is planting time for the cotton season. I am only prepared to plant my crops when I am assured of some control over the mine-workers and their interference with my fences, gates and land;

46.5 I cannot be compensated, in monetary terms, for the gross inconvenience and frustration caused by having a mine situated in the middle of a private farm.

The hardships referred to under paragraph 43 related to-

1. theft from the farm as result of uncontrolled access and the presence of unidentifiable mine workers;

2. the opening up of roads on the farm;

3. the destruction of fences and gates by mine workers taking short cuts;

4. the pollution and soiling of the farm;

5. the danger of applicant's cattle straying onto the unfenced mining area

6. the adverse effects of coal dust on crop transpiration.

The applicant has made no attempt to address the requirements of Rule 6(25)(b) (quoted above). It is abundantly clear from the applicant's own affidavit that he became aware of the alleged irregularities in the mining operations prior to May 993. The advice he received regarding the validity of the Mining Lease should on its own have driven the applicant to put an end to the misery and hardship he states he was suffering, by challenging the first respondent's right to operate the mine. The applicant, instead, allowed the operations to continue and expand with the attendant costs to the first respondent and the obvious increase in the nature of the hardships he complains of. It turned out in the course of the hearing, that the Mining Lease had in fact been signed before a Notary Public and that it was valid. This fact could have been clarified, had the applicant proceeded on the legal advice he had received regarding the lease. As a farmer, he was aware of the commencement of the cotton season. He took no steps to ensure that the matters he complains of were attended to in good time, to enable him to proceed with his cotton planting on time. The applicant, as the landowner, has his rights which the courts can protect against infringement by the first respondent.

The question in the present application, however, is whether or not given the protracted negotiations between the parties the applicant is entitled to rush to Court without affording the respondents the opportunity to reply and state their case to the serious allegations of law and fact set out in the application. The answer in my view is a clear no. The matters complained of by the applicant are long standing. The applicant has not established that he will in anyway be prejudiced by adhering to the time limits set out under Rules 6(10) and 6(12). A great deal of time was devoted to the question of the strength of the applicant's case under the Mining Act. It may well be that the applicant has a strong case, but that does not mean that the application is urgent and that the respondent's right to reply under Rule 6 should be totally ignored.

Mr Flynn referred to the case of **20th CENTURY FOX FILM CORP. v BLACK FILMS 1982 (3) SA 582** for the proposition that the urgency of commercial interests may justify the invocation of Rule 6(25) no less than any other interests. In that case Gordstone J, as he then was, considered the delay by the applicants, a foreign company, in commencing proceedings against respondent. The learned judge in finding that the applicant had not been dilatory in bringing its application stated that each case must be decided on its own facts. The applicant company had international interests which had to receive attention from its executives before the commencement of the proceedings in South Africa. That case is clearly distinguishable from the present application.

Mr Flynn next argued that the applicant should not be punished for having chosen to negotiate with the first respondent over his rights rather than seeking to enforce those rights in court.

Whatever sympathy one may have for the applicant, he cannot have it both ways. He elected to allow the operations whilst negotiating with the first respondent and he cannot after some 18 months seek to enforce his rights in an application brought outwith the provisions of Rule 6.

The applicant has failed to bring his application within the provisions of Rule 6(25). the relief sought under prayer 1 for a waiver of the rules of court regarding notice and service of the application is in the circumstances refused. The applicant must proceed in the normal way under Rule 6(10).

I was addressed on the question of costs and the submission was made on behalf of the first respondent that an award of costs on the attorney and client scale should be made against the applicant with a directive to the taxing master under rule 68(2). I do not consider that such an order would be appropriate. The application, though misconceived in so far as the provisions of Rule 6 are concerned, appears to have been made bona fide. The point which the respondents took and the only one which they indicated would be argued was that of the urgency of the application, an issue which does not place the application within the ambit of Rule 68(2). Argument on the merits of the application would of course be a different matter and a court may be persuaded otherwise after hearing the application.

The relief under prayer 1 of the application is refused with costs.

B. DUNN

JUDGE