IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1369/98

In the matter between

DR. WALTER SUKAH	APPLICANT
And	
DUMSILE SUKATI (Born DLAMINI)	1st RESPONDENT
SAMUEL MNDENI DLAMINI	2nd RESPONDENT
LOMNYAKA DLAMINI	3rd RESPONDENT
Coram	SB. MAPHALALA – J
For Applicant	MR. D. MADAU
For Respondents	MR. P. SHILUBANE

RULING ON POINTS OF LAW (12/11/99)

Maphalala J:

Before court is an urgent application for an order inter alia interdicting the respondent and/or her relatives from proceeding with a traditional wedding scheduled for the weekend of the 12th November 1999, and/or any subsequent date pending finalization of the divorce proceedings instituted against the 1st respondent by the applicant in this case. The application is duly supported by the founding affidavit of the applicant with pertinent annexures.

The 1st respondent opposes this application and Mr. Shilubane on her behalf submitted that there was short service in the matter such that they had not had the opportunity to file opposing papers and present their case. Mr. Shilubane proceeded to raise points of law and applied that the application be dismissed on the strength of those points.

The first point raised by Mr. Shilubane is that the applicant has not proved urgency at all in terms of the peremptory requirement of Rule 6 (25) (a) in that paragraph 11 of the founding affidavit which purports to do so falls far short of satisfying the requirements of this rule. To this end I was referred to the case of Humphrey H. Hemvood vs Maloma Colliery Limited vs Attorney General Civil Case No. 1623/94

(unreported) where Dunn J (as he then was) thoroughly dealt with the requirements of this rule. Where the learned judge made this trenchant observation:

" The mere existence of some urgency does not permit an applicant to disregard the provisions of the rule, for the court is called upon to dispose of urgent applications in such manner and in accordance with such procedures which shall as far as practicable be in terms of these rules"

In that case the learned judge referred with approval to the cases of:

Luna Melibel Vervdarniger vs Makin and another 1977 (4) S. A, 135 Gallencher vs Norman's Transport Lines (Pty) Ltd 1992 (3) S.A. 500 Mangala vs Mangala 1967 (2) 415.

Mr, Shilubane went further to submit that the applicant has not proved that he has no other remedy to satisfy the peremptory requirement of Rule 6(25) b of the rules of this court. There is not a single paragraph in the applicant's affidavit to show this aspect of the matter. He contended that the

applicant knew about this intended wedding as evidenced by his letter of the 29th October 1999, save for writing a letter he did not take any farther steps to stop this wedding and only comes now at the eleventh hour taking the respondent off guard in that she cannot reply but succumb to an order which has not been tested through the exchange of papers and arguments.

The third prong of Mr. Shilubane's attack is that the order being sought is a final order and does not allow the respondent any chance to respond. To this end I was referred to Herbstein at al at page 351.

The fourth point raised by the 1st respondent is that this matter is pre-emminently a matter involving Swazi law and custom and this court cannot entertain it as the court of first instance, I was referred to the case Baruti vs Solomon Mduniso 1961 — 62 S. L. R. 46 at 49 and Dlamini vs Nhlengetwa 1977 78 S. L. R. 79 to fortify this submission.

The fifth and last point raised was that the affidavit by the applicant was badly drawn in that at page 3 the marital status of the 3rd respondent is not reflected to determine whether she has locus standi in judicio to sue or be sued.

Mr. Madau replied to all the points raised by Mr. Shilubane. His view is that a basis has been shown for urgency but I must say that Mr. Madau was at great pains to explain away the absence of an allegation in the applicant's founding affidavit that he has no other remedy in view of the prescribes of the rule. On the question of the court's jurisdiction his view is that the application is a sequel to the divorce proceedings pending before this court and it cannot be said that strictu sensu the matter falls to be determined by traditional courts. On the order being final his answer is that this is not the case if one reads the tenor of the order being sought.

I have reviewed the papers before me and the arguments advanced this morning in this case. 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 of 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 explicitly 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 (my emphasis).

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

In the present case it is my respectful view that the applicant has failed to lay down explicitly the grounds for urgency and that he has no other remedy. A bare statement that the matter is urgent is entirely unsatisfactory. The averments alleging or supporting the second requirement of the rule is conspicously absent. In the case of H.P. Enterprises (Pty) Ltd t/a Heather Fashions vs Nedbank (Swaziland) Ltd Civil Case No. 788/99 (unreported) Sapire CJ eloquently outlined the requirements in the following fashion::

"Litigants must guard against abuse of the urgency procedure more especially where it is calculated to produce an unfoir result. If practitioners, (whether they be attorneys or advocates) issue certificates of urgency without regard to the objective urgency of the matter, the certification becomes meaningless and no credence can be given to such documents. Such practitioners owe a duty to the court in certifying matters as urgent, to have satisfied themselves on objective assessment that the matter is indeed urgent A litigant seeking to invoke the urgency procedure, must make specific allegations of fact which demonstrate that observance of the normal procedures and time limits prescribed by the rules will result in irreparable loss or irreversible deterioration to Ms prejudice in the situation giving rise to the litigation (my emphasis). . The facts so alleged must not be contrived or fanciful, but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow".

In the case in casu it may well be that applicant has an alternative remedy in terms of Swazi law and custom. Thus I rule on this ground alone that the application ought to fail.

In the premise, I do not find it necessary to consider the other points raised by Mr. Sbilubane because doing so will be purely academic in the face of my view taken in respect of the requirements which are an important hurdle for an applicant to overcome to have his case heard. I would also add that respondent were given little time to prepare in this case and this practice of trying to obtain orders at the eleventh hour ought to stop where the other side is placed at a disadvantage.

In the result, I dismiss the application with costs,

S. B. MAPHALALA JUDGE