IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 583/97

IN THE MATTER BETWEEN:

FIRST NATIONAL BANK OF SWAZILAND LIMITED	Plaintiff
Vs	
SITHEMBILE PATRICIA KUNENE	1st Defendant
T/A ARCADE BUTCHERY	
MAVUMABI INVESTMENTS (PTY) LIMITED	2nd Defendant
CORAM	: MASUKU A.J.
FOR PLAINTIFF	: MR. L. N. M. KHUMALO
FOR 2nd DEFENDANT	; MR. P. R. DUNSEITH

JUDGEMENT

28\5\1999

On the 3rd March, 1997, the Plaintiff sued out of the office the Registrar of this Court a combined summons in which it claimed the payment of the sum of El59,356-90; interest thereon at the rate of 22.75% and costs against the 1st Defendant. Against the 2nd Defendant was sought costs on the scale of attorney and own client and an order that certain mortgaged immovable property be declared executable.

The 2nd Defendants filed its Plea and claim in reconvention and the provisions of Rule 35 were complied with. Pursuant thereto, the Plaintiff on the 11th May, 1999 issued a document under the heading "Notice of Application in terms of Rule 33 bis", addressed to the learned Chief Justice and copied to the 2nd Defendant's Attorney.

The full text of the Notice follows hereunder:

"BE PLEASED TO TAKE NOTICE that application is hereby made on behalf of the Plaintiff for an order that this matter be dealt with in accordance with special procedures in terms of Rule 33 bis of the Rules of the Honourable Court.

MAY FURTHER NOTICE BE TAKEN that the Plaintiff considers this matter one to be determined in this above-stated manner for the reasons as shall be set out on the Plaintiff behalf at the Conference hereby requested with the Honourable Chief Justice".

In response to the above application the 2nd Defendant's Attorney filed a Notice in terms of Rule 30 (1) of the Rules of this Honourable Court for an Order in the following terms:-

(a) 'Dismissing the Plaintiff's notice of application in terms of Rule 33 (bis) as an irregular proceeding in that the said application is not supported by an affidavit stating the reasons why the Plaintiff contends the matter falls to be dealt with in accordance with special procedures in terms of Rule 33 (bis);
(b) Costs;
(c) Further or alternative relief.

The relevant provisions of Rule 33 (bis), which are the subject matter of this judgement read as

follows:-

(1) At any time after notice of intention to defend shall have been given in any action, a party thereto, may through the Registrar apply to the Chief Justice, to deal with the application, to have the case declared to one which, on account of its commercial or other importance, or which because there has been undue delay in it coming to trial, should be dealt with in accordance with special procedures.

(2) The Chief Justice or the judge designated by the Chief Justice shall, on receipt of the application, summon the parties to the action or their attorneys, to a conference to be held in the judge's chambers at a time appointed by the judge at which the application can be considered.

(3) Where the judge accedes to the application, the judge may in consultation with the party, then prescribe:-

(a) the procedures and steps to be taken to prepare for trial, including, but not confined to –

(i) the filing of pleadings;
(ii) the making of discovery and production of documents;
(iii) the exchange of summaries of expert evidence;
(iv) any other matters whether provided in the rules or not.

Provided that if no specific prescription in respect of any matter the provisions of these rules shall apply".

During argument, Mr. Dunseith contended that the application filed by the Plaintiff was irregular because it is an interlocutory application to which an affidavit must be filed, setting out the reasons why the Court should invoke the special dispensation recorded in Rule 33 bis. Mr. Dunseith further argued that the application as it stands offends against the principles of natural justice, which require that a party is entitled to know the case that he has to meet. It was further contended on the 2nd Defendant's behalf that where no specific provision is made for the procedure to be followed, then recourse must be had to the provisions of Rule 6, which deals with applications in general and that unless specifically excluded, the provisions of Rule 6 apply.

On the other hand, Mr. Khumalo, for the Plaintiff, contended that Rule 33 (bis) is not the same as Rule 6. It is a self-contained Rule to be interpreted in light of what it has expressly provided. It was further contended that there is no notice required to be given as the application is made to the Chief Justice through the office of the Registrar of this Court. On receipt of the application, it is the Chief Justice or other Judge so designated to deal with the matter that will summon the parties to the hearing, Mr. Khumalo further argued.

It was further submitted on the Plaintiff's behalf that because this Rule is self-contained, in the absence of a requirement for an affidavit to be filed, there is no need to file one, it being sufficient to state the grounds viva voce to the presiding Judge at the conference.

In the light of the aforegoing, the question for determination is whether there is any obligation on the applicant in terms of this Rule to serve the application on the other side and whether it is sufficient for the applicant not to state the grounds in the application with the hope that those will be disclosed to the presiding Judge and the other side at the conference.

I am disinclined to agree with Mr. Khumalo's argument for the reasons that follow herein below:

As regards the issue of notice, it is my considered view that the other side must be served with the application because it has an interest in any order that Court may be inclined to make. Happily in this case, the 2nd Defendant was served with the application. To hold otherwise would offend against one

of the most celebrated sacred and fundamental principles of our law, namely the right to be heard.

In the matter of the SWAZILAND FEDERATION OF TRADE UNIONS v THE PRESIDENT OF THE INDUSTRIAL COURT and THE MINISTER FOR ENTERPRISE AND EMPLOYMENT APPEAL CASE NO. 11/97, the Court of Appeal, per TEBBUTT J.A. stated as follows at Page 10 - 11:

The audi alterant partem principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time ".

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It has not been suggested that the application is ex parte and there is in my view no reason why the other side must not be served with the notice of the application, notwithstanding the fact that there is no specific requirement of notice in Rule 33 bis. It was not the author's intention that the application was to be made behind the other party's back. I accordingly find that where there is no specific enactment in the Rules, guidance must be sought from the provisions of Rule 6, which must however be applied mutatis mutandis so as not to defeat the purpose of the enactment of Rule 33 (bis).

In this regard, it has often been stated that one of the canons of interpretation of statutes, which applies with equal force to subordinate legislation is that the intention most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presured to be the true one.

Maxwell on "The Interpretation of Statutes, 12th Edition, at Page 199 stated as follows;-

"An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available. Where to apply words literally would defeat the obvious intention of the legislation and produce a wholly unacceptable result, we must do some violence to the words and so achieve that obvious intention and produce a rational construction ".

To affix to the Rule in question the interpretation suggested by Mr. Khumalo would obviously lead to a result that collides with convenience, reason, justice and legal principles. For that reason, it must, in my view not be adopted as the true intention of this subordinate legislation.
On the question whether an Affidavit must be filed setting out the grounds on which it is contended that the case should be dealt with in accordance with the special procedures, my considered view is that an affidavit must be filed.

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The corollary of the audi alteram partem principle has been held to refer to two aspects of a fair hearing, namely, notice of intended action and a proper opportunity to be heard. Regarding the first aspect, Lawrence Baxter, Administrative Law, First Edition, 1984 at page 545, states that:

"For the hearing to be a fair one, the notice of the impending action should also specify the salient factors motivating the proposed action. Without this, the affected individual cannot hope to prepare his objections adequately".

On the second aspect, Baxter (supra) states as follows at page 546, citing HEATHERDALE FARMS (PTY) LTD v DEPUTY MINISTER OF AGRICULTURE 1980 (3) SA 746

"What would follow ..... is firstly, that the person concerned must be iven reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly, he must be put in possession of such information as will render his right to make representations a real, and not an illusory one ".

It is my view that the above principles enunciated by Baxter must be applied to the instant case. First

and foremost, it must be borne in mind that this is a special dispensation, the effect of which is to "fast-track" a matter on the roll, thereby taking priority over matters that were instituted much earlier. This procedure also jettisons some of the usual procedures set out in the Rules of Court. For that reason, it is imperative that the reasons for the Court to exercise its discretion in favour of the Applicant must be clearly set out under oath. It does not suffice in my view that the other side and the presiding Judge should be kept in the dark until it dawns, as it were, on the day of the conference, where the Court will rely on the say so of the parties or their representatives.

The Court must be able to consider the reasons in advance and the other side must also peruse these reasons and if necessary take instructions regarding whether in fact,

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the particular circumstances alleged do dictate that the special procedures should be invoked.
From a reading of sub-rule (1), it is vivid that there are three categories of reasons that should be advanced in order to benefit from this procedure, namely, commercial importance, other importance (which may include situations not readily comprehended by the other side or the Court for that matter) and in cases of undue delay. The other side must know of the reasons alleged, firstly to consider whether they do fall within the ambit of the Rule at all and if so, to help the Court decide whether the reasons advanced merit the jettisoning of the ordinary Rules.

In appropriate cases, it may be incumbent upon the other side to file its own papers in which the relief sought is opposed and the reasons therefore must likewise be put on affidavit. The presiding Judge will consider the papers filed, hear any oral submissions at the conference and then make an order appropriate in the circumstances. Where the reasons are not set out in advance, it may lead to this procedure being abused by litigants moving the applications, knowing fill well that the other side will be taken by surprise and the presiding Judge will only hear at the conference the cogency of the reasons for the application. This should be avoided at all costs. Notice on the other side and the filing of affidavits in support of the relief sought will militate against abuse of the procedure.

I again wish to emphasise that in my aforestated view, in the absence of express directions in the Rule in question, then the Rules should apply as was submitted by Mr. Dunseith. In this regard, the provisions of Rule 6 (1) and Rule 6 (24) apply mutatis mutandis. This is borne out by the proviso to Rule 33 (bis) 3 (a), which refers to the prescriptions that the presiding Judge can make once he has ruled that the matter is one to be dealt with in terms of the Rule. The proviso states that if no specific prescription is made in respect of any matter, the provisions of the Rules shall apply. In my view, this is an indication of the approach to be followed in all other cases where the Rule makes no specific provision.

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As a matter of observation, it appears to me that in sub-rule (3), the word "party" occurring in line two thereof should read "parties". If I am correct in my view, the relevant portion would read as follows:-

"Where the judge accedes to the application, the judge may in consultation with the parties, the prescribe..... "

In my view, it was not the intention of the author to exclude the other party once a decision had been made to invoke the special provisions. This is so because in sub-rule (2), it is clear that both parties are invited to the conference in the Judge's chambers. Furthermore, the other party must also be consulted in relation to the prescriptions set out in sub-rule 3 (a) because they would affect him/it. It may be that the time limits suggested and the trial date set is not suitable. That party must also put its case to the Court so that any directions given by the Judge take the other party's interests into consideration. In my view, the sub-rule cries for an immediate attention in order to bring it in line with the intentions of the author.

On the whole, it is my considered view that the contentions by Mr, Dunseith must be upheld. In the result, an order is granted in terms of prayers (a) and (b) of the Rule 30 Notice and the Plaintiff is given leave to file a fresh notice, in compliance with the directions set out in this judgement.

T. S. MASUKU

ACTING JUDGE