IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1050/2000

In the matter between

DANDI INVESTMENTS (PTY) LIMITED	
T/A DANDI FURNISHERS	APPLICANT
And	
SWAZILAND BREWERS LIMITED	1st RESPONDENT
THE DEPUTY SHERIFF	2ND RESPONDENT
THE ATTORNEY GENERAL	3rd RESPONDENT
Coram	S.B. MAPHALALA - J
For Applicant	MR. L. MAZIYA (Instructed By Justice Mavuso)
For Respondents	MS VAN DER WALT (instructed by Millin & Currie)

RULING ON POINTS IN LIMINE

Maphalala J:

In this application which is brought under a certificate of urgency, the applicant prays for inter alia.

1. Dispensing with forms of service and the time limits prescribed by the rules of the court and hearing this matter urgently calling upon the respondents to show cause, if any, on a date to be fixed by the court, why:

i) The garnishee notice dated the 19 May 2000 issued under case number 1050/2000 should not be declared as having been issued and or executed illegally.

ii) Directing the first and third respondents, jointly or severally the one paying the other to be absolved to return and or pay applicant a sum of E102, 000-00.

iii) Costs of suit.

iv) Further/alternative relief. The applicant, in his founding affidavit deposed as follows:

Sometime in March 2000, the first respondent caused summons to be issued against the applicant. The first respondent's claim was for payment of the sum of E94, 451 -02 with interest to be calculated at the rate of 12% per annum and costs of suit. On the 12th May 2000, an agreement of settlement which had

been entered into between the parties (applicant and first respondent) was made an order of court. Subsequent to the agreement of settlement having been made an order of court, the first respondent proceeded to issue a writ of execution. The Deputy Sheriff for the district of Manzini proceeded to attach certain property belonging to the applicant. The writ was issued on the 15th May 2000.

On the 19th May 2000, the first respondent proceeded to issue a garnishee notice in terms of Rule 43 (13) (a). This notice was only served upon the garnishee, the third respondent herein. The applicant who was then the judgment debtor never received a copy of the notice.

On the 23d May 2000, as applicant's manager, signed a surety bond in terms of Rule 45 (6) undertaking not to remove and or dispose of the attached goods and further, binding himself, his personal goods and effects to pay and satisfy the sum of E94, 451 - 02 to the Deputy Sheriff in the event the goods were disposed of. Notwithstanding the signing of the surety bond the Deputy Sheriff, for the district of Hhohho, who is the second respondent proceeded to attach and remove the goods for safe keeping elsewhere.

On or about the 21st September 2000, the applicant's manager proceeded to collect money due to the applicant from the Accountant General's offices. The sum he was going to collect was the sum of E129, 735.00. When he reached the Accountant General's office he was then advised that the cheques had been collected by the first respondent, on the strength of the garnishee notice. He was informed that the amount was forwarded to the first respondent. He then took the matter with the respondent's attorneys and was refunded a sum of E27, 735-00.

Applicant deposed that the garnisheeing of the amounts due to the applicant is unfair and illegal. The applicant, put forth a number of reasons of holding this view and these are fully canvassed at paragraph 16.1 up to 16.9 of the founding affidavit. Of significance though is an averment at paragraph 16.7 to the effect that in terms of the writ of execution the Deputy Sheriff was directed to attach and take into execution the movable goods of "Dandi Investments (Pty) Ltd T/A Dandi Bottle Store Industrial Sites, Matsapha, instead of doing as directed, he proceeded to attach goods belonging to Dandi Investments (Pty) Ltd T/A Dandi Furnishers, situated in Matsapha

Subsequent to having paid out the sum of E129, 735-00 to the first respondent, the third respondent has provided applicant with copies of cheques totalling the aforesaid amount. As to how these cheques were honoured, the applicant does not know because they were drawn in favour of the applicant and clearly marked not transferable.

Applicant went on to relate at paragraph 22.1, 22.2 and 22.3 how this action which he considers as unlawful and illegal of garnisheeing of funds destined for Dandi Investments (Pty) Ltd T/A Dandi Furnishers are causing applicant irreparable harm. Applicant's electricity to the premises has been disconnected by the Swaziland Electricity Board. The Swaziland Post and Telecommunications Corporation has also stopped calls destined to applicant. Further, salaries for all applicant's ten employees, for the month of September have not been paid and it is inconceivable that they will be paid for this month. Also applicant's suppliers have sent letters of demand as they expected payment at the end of September 2000.

In opposition to the orders prayed for by the applicant, the 1st respondent, raised the following main points of law, on the basis of which this court was moved to dismiss the application with costs, on the attorney and own client scale, namely;

i) AD Notice of Motion

The applicant's notice of motion is fatally defective in that same does not comply with High Court Rute' 6 (9). in this connection the court in argument was referred to the case of Ben Zwane vs Deputy Prime Minister & Another Case No. 624/00 a judgement by Masuku J dated 24th March 2000, at pages 7 to 9 (and the authorities cited therein).

ii) AD Relief Sought

The applicant does not dispute that it is indebted to the first respondent, not that it was indebted to it in the sum of El02, 000-00 (i.e. the garnishee amount minus the refund). The applicant is not relying on any recognised cause of action, and if it is, same is not disclosed in the papers. As such, the basis of the application is invalid in law.

iii) AD Urgency

The applicant failed to set forth explicitly the circumstances which it avers renders the matter urgent, and the reasons why it claims it could not be afforded substantial redress at a hearing XXX course, as is required by High Court Rule 6 (25).

iv) AD Form of Proceedings

In so far as it may be said that the applicant had a valid cause of action, it should have foreseen disputes of fact incapable of

resolution on the papers, and should have used action procedure instead of application procedure.

The applicant argued in contra as represented by Mr. Maziya. Rule 25 of the High Court Rules of Swaziland, does not stipulate any form that is to be followed nor does it require certain allegations to be made in fulfilment of its provisions. Alternatively, applicant has in his application applied for dispensation of forms of service and the limits prescribed by the rules of this court. Further, that legal justification for the relief sought has been advanced. The fact that applicant is indebted to 1st respondent does not entitle it to act illegally and unlawfully in recovering its debt, furthermore, in the papers, as they stand, there is no dispute of fact which would render the hearing of oral evidence necessary.

When arguing the matter Mr. Maziya for the applicant stated that the applicant has not disputed its indebtedness to the 1st respondent. The debt is in respect of Dandi Bottle Store not Dandi Furnishers in whose name the cheque was made. With respect to Mr. Maziya this is not so. Annexure "E1" of the founding affidavit viz, the two cheques referred to by Mr. Maziya do not state, as Mr. Maziya would like the court to believe that the said cheques were destined for Dandi Furnishers. The two cheques clearly state the payee to be Dandi Investments. Nowhere on the cheques does the name Dandi Furnishers feature. Mr. Maziya's argument therefore on this point does not hold water.

On the question of whether there are any disputes of fact it is Mr. Maziya's view that there are no genuine disputes of fact. On the main issue there is no dispute of fact. There is no provision in Rule 45 (13) (a) of a cheque to be attached by a law firm in contravention of the Sheriffs Act.

On the question of urgency Mr. Maziya contended that the averments in paragraph 22 clearly established the basis to hold that the matter is urgent.

On the issue of whether the applicant has a cause of action it was contended that there is no reason why applicant should allege a link between the cheques and the applicant. The cheque belonged to the applicant.

On the question of form of application Mr. Maziya submitted that there is no dispute that the application has not been brought in terms of Rule 6 (9). To this effect he cited a number of South African decided cases to the effect that although it is appreciated that without formal rules of procedure no legal system of any sophistication could function. But be that as it may, the insistence upon the inflexible observance of the rules should not be allowed to frustrate substantive justice. The court is to look at the issue of prejudice to decide this aspect of the matter. In casu the 1st respondent cannot be prejudiced by this

form.

I now proceed to determine the points in limine thus:

i) AD Notice of Motion

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It is common cause that the notice of motion is lacking in so far as it does not comply with Rule 6 (9) of the High Court Rules. On this point I agree in toto with the ratio in the case of Ben M Zwane (supra). The practice in the past on such matters has been wrong in that the strict procedure envisaged in Rule 6 (9) was not followed. I agree with the sentiments expressed by the learned judge in that case that time has come for this court to insist on the strict requirements of Rule 6 (9), regarding the use of form 3. It is not enough for counsel to argue as Mr. Maziya that he was not aware of the dicta in that case. I am not persuaded by applicant's submission that the 1st respondent will not be prejudiced. I thus find that this point in limine is valid.

ii) AD Relief Sought.

It is trite law that an applicant in application proceeding has to advance a recognised cause of action. This has to be clearly disclosed on the papers. It is not enough for counsel to argue from the bar the mere averment that the cheque belonged to applicant. From the papers one cannot make a connection between Dandi Furnishers and the said cheques in view of what I observed earlier on in the judgement.

I thus uphold the point in limine in view of what I outlined above.

iii) AD Urgency.

In this respect the guiding principle was crisply expressed in the case of Henwood vs Maloma Colliery and another Case No. 1623/93 where Dunn J held that the provisions of Rule 6 (25) (a) and (b) are peremptory and I need not to go through it as it has since become a locus classicus in this court.

Further the dicta in the case of Megalith Holdings vs RMS Tibiyo (Pty) Ltd and another Case No. 199/2000 is instructive in this regard. The following trenchant observations at page 5 were expressed:

"The provisions of Rule 6 (25) (b) above exact two obligations on any applicant in an urgent matter. Firstly, that the applicant shall in affidavit or petition set forth explicitly the circumstances, which he avers, renders the matter urgent. Secondly, the applicant is enjoined, in the same affidavit or petition to state reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear ex facie the papers and may not be gleaned from surrounding circumstances XXX attention from the bar in an embellishing address by the applicant's' counsel (my emphasis)".

In casu averments of irreparable harm are reflected in paragraph 22 of the founding affidavit.

Irreparable harm is not alone sufficient in law

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to ground urgency. The circumstances giving rise to the urgency should be explicitly outlined. The requirements of the rule were not followed. It was not also established in the papers reasons applicant claims it cannot be afforded substantial redress at a hearing in due course as prescribed by Rule 6 (25) (b) (see also Megalith Holdings (supra).

I thus uphold this point in limine. iv) AD Form of Proceedings.

A number of disputes of fact were outlined by Miss Van Der Walt on behalf of the 1st respondent viz,

paragraphs 6.9, 16.1, 16.3, 16.9 and 21. These have not been explained away save to say these should be genuine disputes of fact. In my view they are germane in the proper resolution of this case.

I thus uphold this point in limine.

As an aside it is an unatable argument to submit that the court should go beyond points in limine as there may be used by one party who has no case on the merits to frustrate an applicant. Any party is entitled to put forth points of law and it is for the court to decide their efficacy or otherwise. A party bringing an application ought to cover all grounds lest he be taken in limine.

In the totality of things, therefore in view of my finding outlined above, I dismiss the application with costs. I however am not convinced 'that there are, in the circumstances reasons why costs should be on a punitive scale. Costs be and are hereby declared to be on the ordinary scale.

S.B. MAPHALALA

JUDGE