THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 519/2002

In the matter between

SIBONILE ENID NDLOVU	APPLICANT
And ALFRED GCINAPHI DLAMINI	RESPONDENT
Coram	S.B. MAPHALALA - J
For the Applicant	MS N. GWIJI
For the Respondent	MR. B. SIGWANE

RULING ON POINT IN LIMINE

(15/03/2002)

On the 5th March 2002, the applicant filed an application with a certificate of urgency for an order compelling the respondent to pay applicant a sum of El, 082-62 per month until the sum of El 1, 126-20 has been paid off and costs.

The application is based on the founding affidavit of the applicant herself. The respondent opposes this application and has filed an answering affidavit thereto. The applicant has filed a reply to the respondent's answering affidavit.

The applicant and the respondent are the natural parents of a 24-year-old Mlungisi Dlamini born on the 20th January 1977. The child was born out of wedlock. The amount being sought by the applicant in this matter arose out of a scholarship which

was granted to the said Mlungisi by the Swaziland Government to attend college at the University of Pretoria. It appears from the papers that the amounts were now due to Government after Mlungisi had completed his studies, although there is a difference of opinion on this aspect of the matter. The applicant alleges that there was an agreement between them that respondent was to pay back these monies to Government but the respondent denies that there was ever such an agreement, that whatever payment he has made were on ex gratia basis to ease any burden that might be visited upon the applicant's income and budget from time to time.

The respondent raised two points in limine. First, that there are material disputes of fact that are incapable of being resolved without the calling of evidence, that it is improper for an applicant to proceed by way of motion proceedings. Secondly, where a litigant intends to recover a debt or is founding a claim on a breach on the terms of an agreement, such litigant ought to proceed by way of action.

When the matter appeared before me on the 12th March 2002, Mr. Sigwane advanced reasons to support the points in limine raised. On the first point he took the court through a number of material disputes ex facie the papers before court. These disputes of fact are not resoluble on the papers. The most crucial point which goes to the root of the matter is that the applicant alleges that there was an agreement between them that the applicant was to pay a specific sum of money towards the liquidation of the monies owing to the Swaziland Government yet on the other hand the respondent alleges that his contributions were merely ex gratia as it was his moral obligation as a parent to assist the child.

Mr. Sigwane further contended that this claim by the applicant is based on contract and as such the

proper procedure would be to issue summons and follow the prescribes of Rule 18 of the High Court Rules.

Miss Gwiji for the applicant argued per contra. I must say though from the outset that her arguments with the greatest of respect, missed the point entirely and did not advance her client's case in any way, except to appeal to the court's sympathy on her client who is obviously in financial dire straits. However, the law has to take its course.

I shall proceed to determine the points of law in limine in seriatum, viz i) whether there are disputes of fact, and ii) whether applicant ought to have proceeded by way of action proceedings.

i) Whether there are disputes of facts

It is trite law that where, at the hearing of motion proceedings, a dispute of fact on the affidavit cannot be settled without the hearing of oral evidence (see Plascon - Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A)). The court may, in its discretion, a) dismiss the application; b) order oral evidence to be heard on specified issues in terms of the rules of court; or c) order the parties to trial. Every claimant who elects to proceed on motion runs the risk that a dispute of fact may be shown to exit, and the way in which the court exercises its discretion as to the future course of the proceedings in such an event will depend very much upon the extent to which the claimant is found to have been justified in accepting that risk (see Hassim vs Mohamed 1931 (2) P.H.C 53 (T)). If, for example, the applicant should have realized when launching his application that a serious dispute of fact was bound to develop, the court may dismiss the application with costs. In Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)) the "principal ways" in which a dispute of fact may arise are set out as follows:

i) When the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence be deponents or witnesses to the contrary. He may have witnesses who are not presently available or who though adverse to making an affidavit, would give evidence viva voce if subpoenaed.

ii) When the respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes.

iii) When the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself gives or proposes to give evidence to show that the applicants and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by a

respondent directly contradicting the applicant's main allegations does not render the matter free of a real dispute of fact.

In casu there are numerous glaring disputes of facts which are not resoluble on the papers. Mr. Sigwane highlighted them with a very high degree of clarity but the most glaring one is the dispute as to whether there was an agreement between the parties.

Following the dicta in Room Hire (supra) one does not employ motion procedure in claims for damages, in matrimonial matters or in any case where the applicant's right of relief depends on a fact which is disputed by the respondent or which may reasonably be expected to be disputed. In this case I am obliged to dismiss this application in view of the number of material points which are in dispute which cannot even be cured by referring the matter for viva voce evidence. The applicant is well advised to proceed by way of summons in terms of Rule 18 of the High Court Rules. A totally incorrect procedure

has been adopted in this matter.

In view of my findings above I find it not necessary to consider the second point in limine which is in some way intertwined with the first point raised.

In the result, I dismiss the application with costs.

S.B.MAPHALALA

JUDGE