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THE HIGH COURT OF SWAZILAND

CHARLES MBINGO

Applicant

AND

PROPERTY HOLDINGS LIMITED

Respondent

CIVIL CASE NO. 3155/2000

Coram	S.B. MAPHALALA – J
For the Applicant	MR. L.MALINGA
For the Respondent	MR. J. HENWOOD

RULING ON POINTS IN LIMINE

(18/07/2002)

This is an application brought under a certificate of urgency and in which the applicant prays for *inter alia* an order directing the respondents to release to the applicant his personal goods as listed in annexure "A".

The application is founded on the affidavit of the applicant himself. The respondent have filed their Notice of Intention to Oppose and also a Notice in terms of Rule 6 (12) © raising points of law.

This matter is long outstanding in that a similar application was launched by the applicant sometime in October 2000, for the same relief and this matter is still pending under the same case number and is to appear before court on the 19th July 2002. When the matter came before me on the 11th July 2002, I heard the points of law raised by the respondent and reserved my ruling thereon to the following day the 12th July 2002. However, due to the heavy roll before me I had not prepared a full judgement but delivered my ruling dismissing the application with costs on the ordinary scale in open court and I indicated to counsel that reasons for judgement would follow in due course. Following is my reasons for dismissing the application on the 12th July 2002.

Mr. Henwood on behalf of the respondent raised four points *in limine*. First, that the matter is not urgent in that the applicant has failed to set out any reasons, sufficient to comply with Rule 6 (25) (a) why the present application has been brought on an urgent basis. Second, that this application does not conform with Form 3, the applicant herein brought the same in accordance with Form 2, which is expressly designed for *ex parte* applications. Third, that this matter is *lis alibi pendens* in that the present application seeks an identical relief in the proceedings pending under case no. 3155/2000 and as such cannot obtain identical relief herein. Fourth, that the applicant states on his own version the goods sought by him being certificates are not included in annexure "A1" and "A2" mentioned in paragraph 6 of the applicant's founding affidavit at page 5 of the Book of Pleadings and are thus not in the possession of the respondent.

I have heard submissions from both Mr. Henwood and Mr. Malinga for the applicant where I was directed to various portions of the pleadings before me and legal authorities cited for and against the points raised.

My finding is that all but one point raised by Mr. Henwood for the respondent ought to succeed and thus vitiating the whole application. The respondent cannot succeed on the last point raised. I shall proceed to briefly determine the points of law, *ad seriatim*:

1. **Whether applicant has proved urgency in conformity with Rule 6 (25) (a) and (b).**

The applicant in the present case approaches the court on an extreme urgent basis and it is incumbent on him to make out a case justifying the urgency with which the application was brought. The respondent was given a mere three hours to respond to the application.

In the case of ***Humprey H. Henwood vs Maloma Limited, Civil Case No. 1623/94*** (unreported) Dunn J (as he then was) clearly outlined the approach to be adopted by litigants in such instances. The principle was succinctly enunciated in ***Luna Meuber Vervaardigers (EDMS) BPK vs Makin and another t/a Makins Furniture Manufactures 1977 (4) S.A. 135 (W) at 1366 – 1376*** where Coetzee J had this to say, and I quote:

> "Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relation of the Rules and of the ordinary practise 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) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down"

See also ***Gallagher vs Norman's Transport Lines (Pty) Ltd 1992 (3) S.A. 500*** and ***Patcor Quarries CC vs Issroff 1998 (4) S.A. 1009 (SE) at 1075.***

In Rule 6 (25) (b) of the rules of this court, the following is stated:

> "(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 that he could not be afforded substantial redress at a hearing in due course". (my emphasis).

In *casu*, the averments which seek to establish urgency are found at paragraph 6 of the applicant's founding affidavit and reads as follows:

> " I now need items listed annexure "A" as a matter of urgency in order to enrol at the Management College of Southern Africa "MANCOSA among whose requirements is the submission of my academic certificates. The closing date for the submission of these certificates is the 15th day of July 2002 and failure to do so will mean an opportunity lost. A copy of the letter of acceptance by "MANCOSA" is annexed hereto marked annexure "B""

This paragraph fails dismally to satisfy the requirements of Rule 6 (25) (b) in that the applicant does not advance reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

The letter from "MANCOSA" (annexure "B") is dated the 6th May 2002 and there is no explanation why the applicant is approaching the court only now. The court was only told by Mr. Malinga from the bar the reasons for this delay and that was tantamount to giving evidence by Mr. Malinga on motion proceedings. I thus cannot take cognisance of evidence advanced by counsel from the bar.

On this aspect of the matter my considered view, is that the applicant has failed to establish urgency as required by Rule 6 (25) (a) and (b) of the rules of court but Mr. Malinga merely paid lip service that the applicant's papers satisfies the strictures of the rule.

The point *in limine* ought to succeed.

2. Notice of motion a nullity

Mr. Henwood argued that instead of bringing this application in conformity with Form 3, the applicant herein brought the same in accordance with Form 2, which is expressly designed for *ex parte* application. Mr. Henwood's contention is correct and is fully supported by the rules.

Rule 6 (9), which is peremptory, states as follows:

> "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 and true copies of notice, the

> supporting affidavits and all annexures thereto, shall be served upon any party to whom notice thereof is to be given".

My brother Masuku J in the case of ***Ben M. Zwane vs The Deputy Prime Minister Civil Case no. 624/2000*** (unreported) postulated the requirements of this rule with considerable force, thus: (at page 7):

> "Form 3 requires the respondent, in addition to other issues to be informed of when a notice to oppose, if any, should be filed and also when answering affidavits should be filed. Form 2, which is presently being used is clearly for *ex parte* applications as envisaged by the provisions of Rule 6 (4) and the said Form 2, itself clearly stipulates so".

In *casu* the Form adopted is clearly not in conformity with the rules. Mr. Malinga for the applicant when making submissions was hard pressed to explain this anomaly consoling himself that what is important is that the respondent is before court. With the greatest of respect, to Mr. Malinga that is a total incorrect approach to adopt in these matters were rules are clear as to what should be done.

I hold that the point *in limine* in this respect ought to succeed on the basis of the above-mentioned reasons.

3. Whether the matter is lis pendens

It is trite law that if an action is already pending between parties and the plaintiff/applicant brings another action/application against the same defendant/respondent on the same cause of action and in respect of the same subject, matter whether in the same or in a different court, it is open to the other side to take the objection of *lis pendens* (see ***Herbstein et al The civil Practice of the Supreme Court of South Africa (4th ED) at 249*** and the case cited thereat).

Clearly, in the present case the matter is *lis pendens* the applicant ought to have anticipated the return date of the main application which is coming before court on the 19th July 2002 and file a supplementary affidavit in accordance with the rules of court not to launch a fresh application under the same case number and on the same subject matter.

For the above reasons the point *in limine* raised by the respondent ought to succeed.

4. Whether goods sought are not included in annexure "A1" and "A2".

It would appear to me from the reading of the papers that the items being sought in the present application, viz academic certificates are included in annexure "A1" under item 10 as ***"1 suitcase with clothes and certificates"***. These items are listed as items in the possession of the respondent. For whatever it is worth, I agree with Mr. Malinga that this point *in limine* ought to fail.

5. The issue of costs

Mr. Henwood urged the court to award the costs on an attorney and client basis on the basis of Mr. Malinga's conduct in these proceedings. I have considered the matter being guided by what was said by Tindall JA (Schreiner JA and Feetham AJA concurring) in ***Nel vs Waterberg Landbouwers Ko-operative Vereeniging 1946 A.D. 597*** and I an unable to impute dishonest or fraud or that the applicant's motives have been vexations, reckless and malicious, or frivolous.

I would rule that in the circumstances the applicant pays costs in the ordinary scale.

6. The Court Order

In the result, the application is dismissed with costs on the ordinary scale.

S.B. MAPHALALA

JUDGE