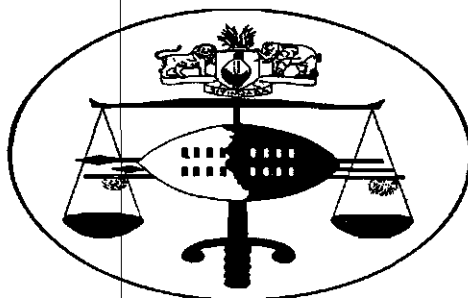


1292



THE HIGH COURT OF SWAZILAND

TONY NKAMBULE

1st Applicant

NOZIPHO PHIRI

2nd Applicant

And

T.J. PLUMBING SUPPLIERS & MAINTENANCE

1st Respondent

FUMA MVUBU

2nd Respondent

THEMBI VILAKATI

3rd Respondent

REGISTRAR OF COMPANIES

4th Respondent

SWAZILAND ELECTRICITY BOARD

5th Respondent

SWAZILAND NATIONAL HOUSING BOARD

6th Respondent

MBABANE CITY COUNCIL7th Respondent**CONSTRUCTION ASSOCIATES (PTY) LTD**8th Respondent

Civil Case No. 1124/2003

Coram

For the Applicants

For the Respondents

S.B. MAPHALALA – J

MR. SIMELANE

MR. MABILA

RULING(On points of law in *limine*)

(04/07/2003)

The Applicant filed an application under a certificate of urgency with the Registrar of this court on the 22nd May 2003, for an order as follows:

1. Dispensing with the normal and usual requirements of the rules of the above Honourable Court relating to services and form of processes and notices and hearing this matter as a matter of urgency.
2. That a rule *nisi* do hereby issue calling upon the Respondents to show cause on Friday the 30th May 2003 why an order in the following terms should not be made final.
 - 2.1. Directing that the original Form J whose copies are annexed in this papers should be set aside.
 - 2.2. Directing that all other documents filed by the 2nd and 3rd Respondents to the office of the 4th Respondent should also be set aside.
 - 2.3. Directing that the 5th, 6th, 7th and 8th Respondents should not make any payment due to 1st Respondent to anybody until his application has been resolved, and thereafter to pay to the Applicants as Directors of 1st Respondent.

- 2.4. Directing the 2nd and 3rd Respondents to vacate the premises of 1st Respondent and to hand over all books, furniture and equipment to the Applicants
3. That the rule *nisi* above operate with immediate interim effect.
4. Granting costs on attorney and client scale in the event the Respondents oppose the application.
5. Further/alternative relief.

The founding affidavit of the Applicant is filed in support thereto. Various annexures in support of the Applicant's application are also filed.

The 1st, 2nd and 3rd Respondent opposes this application and the opposing affidavit of the 2nd Respondent is filed in opposition thereto. Annexures "FM1" and "FM2" being a resolution of the Board of Directors of T.J. Plumbing Suppliers held on 30th January 2002 and a cheque from Construction Association Ltd payable to T.J. Plumbing dated the 12th may 2003, respectively. A supporting affidavit of the 3rd Respondent is filed in support of the main opposing affidavit by the 2nd Respondent. Further, two confirmatory affidavits are filed one by Bongiwe Duma of the Attorney General's chambers and the other by Mduduzi Mabila who is the attorney for the Respondents in this dispute.

The Respondents have raised points of law which are the subject-matter of this judgment. These are found in 2nd Respondent's opposing affidavit and they are couched in the following terms:

"In limine

-2-

The matter is not sufficiently urgent to warrant the above Honourable Court dispense with the procedures pertaining to time limits and manner of service set out in the rules of court.

Alternatively, the alleged urgency is self-created.

-3-

The application should be dismissed in that it has got a lot of material disputes of facts which cannot be decided on affidavit.

-4-

The application is bad in law in that, save for a confirmatory affidavit, no supporting affidavit has been filed by the 2nd Applicant.

-5-

The application does not meet and/or satisfy the requirements of an interdict.

I must state that this matter was argued in a truncated form. *Mr. Mabila* argued the points of law on behalf of the Respondent and the matter was postponed to another date for *Mr. Simelane* for the Applicants to reply. In the meantime Respondents filed affidavits and in turn *Mr. Simelane* for the Applicant filed a replying affidavit on behalf of the Applicants. An issue arose when *Mr. Simelane* made his reply whether the replying affidavit should be considered as Respondents had commenced their points without the existence of the replying affidavit. *Mr. Mabila* expressed the view that the replying affidavit should be disregarded for purposes of arguing the points of law as some averments therein are put forth to cure the defects in the founding affidavit. I agreed with *Mr. Mabila* in this regard despite *Mr. Simelane's* protestations. I ruled that for the time being for purposes of determining the points of law the replying affidavit should not be referred to by *Mr. Simelane* for the Applicants.

Mr. Mabila argued at great length in support of the points of law in *limine*. In turn *Mr. Simelane* filed very comprehensive Heads of Argument as usual and the court is indebted for his industry.

I shall determine the points raised in *seriatum*.

1. Urgency

Both counsel in this regard are in total agreement as to the legal position in urgent applications. I find it not necessary to recount the law in this regard as it has become trite in this division that, firstly, the Applicant shall in his affidavit or petition set forth explicitly the circumstances which he avers renders the matter urgent and secondly, the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. (see *Luna Meuber Vervaardigers [EDMS] BPK vs Makin and another T/A Makins Furniture Manufactures 1977 (4) S.A. 135 (W)* at 136G *en fin* 137G; *Gallagher vs Norman's Transport Lines (Pty) Ltd 1992 (3) S.A. 50*; *Humphrey H. Henwood vs Maloma Colliery Ltd – Case No. 1623/94 per Dunn J (as he then was)* and *H.P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Ltd (per Sapire CJ (as he then was))*).

In *casu* the Applicant in support of the allegation of urgency in terms of Rule 6 (25) (b) avers at paragraphs 27 to 30 of the founding affidavit as follows:

“Urgency

I submit that the matter is urgent in that presently I am out of a job and the company was providing for my upkeep.

27.1 If I am not heard on an urgent basis I will suffer irreparable harm as the 2nd and 3rd Respondent will continue to incur further liabilities on the company and by time that I have been heard by the court I will find that the company is not worth anything.

- 28 -

I submit that the reckless spending of money by the 2nd Respondent the company will incur many debts, as he will not have anyone who is going to stand up against him.

- 29 -

Further this company has clients through my hard work and should the present application take its normal course I would find that I do not have anybody to supply.

- 30 -

I submit that there is no reasonable cause why the 2nd Respondent should not leave the company as he has paid back his loan. I remember that at around November 2002 we made more than E30, 000-00 profit.

30.1 However the 2nd Respondent blew all this money as he did not give me a Christmas bonus (my emphasis)".

On the papers it would appear to me that the Applicant has satisfied the requirements of Rule 6 (25) (b), for abridging the rules and procedures and I would thus overrule the objection in this regard.

2. The filing of a confirmatory affidavit by the 2nd Applicant.

The argument advanced on behalf of the Respondents in this regard is that the 2nd Applicant should have filed a founding affidavit or supporting affidavit in her own right. The filing of a confirmatory affidavit was improper.

I have considered the arguments advanced for and against this point. I am inclined to agree with *Mr. Simelane* that this court should be guided by rules and in the case of *Gideon Gama vs Peter Masango – Court of Appeal Case No. 20/97 (unreported)* where the following was enunciated; and I quote:

"Rules governing procedure such as the rules of the Court, are not made to enable the lawyers representing parties to a dispute to score points off on another, without advancing the resolution of that dispute in any way. They are guidelines aimed at obliging the litigants to define the issues to be determined, within a reasonable time and enabling the Courts, as a consequence to organise their administration as quickly, effectively and fairly as possible".

No prejudice is suffered by the Respondents that the 2nd Applicant has not filed a founding affidavit. I agree in *toto* with *Mr. Simelane* that substantive justice dictates that this matter should be resolved as a matter of urgency as I have already found in the 1st head above.

I thus find that the point of law *in limine* raised is without substance in the circumstances of this case.

3. Disputes of facts.

It was contended on behalf of the Respondents that the application should be dismissed in that it has a lot of material disputes of facts which cannot be decided on affidavit. It is contended on the other hand on behalf of the Applicant that there are no disputes of facts in this matter.

It is trite law that a real dispute of fact arise most obviously when the Respondents denies material allegations made by the deponents on the Applicants' behalf and produces positive evidence to the contrary (see *Herbstein et al, The Civil Practice of the Supreme Court of South Africa (4th ED)* at page 238 and the cases cited thereat).

The determination of the question whether a real and genuine dispute of fact exists is a question of fact for the court to decide (see *Ismail and another vs Durban City Council 1973 (2) S.A. 362 (W)* at 374).

In *casu*, I am inclined to agree with *Mr. Mabila* that there are numerous disputes of facts. Firstly, there is a glaring dispute of fact as to the directorship of the company. The Applicant maintains that he is still a Director of the 1st Respondent whilst the Respondents hold the direct opposite. This cannot be reconciled on the papers. Secondly, and this seems to have been conceded by *Mr. Simelane* for the Applicant that there is a dispute as to whether the business was sold or that they entered into an agreement. There is also a dispute as to the amount which changed hands in this transaction. Thirdly, there is a dispute of fact as to whether the Applicant was present on the 10th October 2002, at Ngwenya when the Board of Directors held a meeting. Lastly, the validity or otherwise of "Form J" presents a further dispute of fact.

Having found that there are disputes of fact the court then has to determine the future course of the proceedings. The trite principles which govern in such circumstances is that where, at the hearing of motion proceedings, a dispute of fact on the affidavits cannot be settled without the hearing of oral evidence, 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 (see *Herbstein (supra)* at page 241). In the instant case it is my considered view that the Applicant ought to

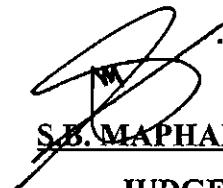
have realized when launching his application that serious disputes of fact were bound to develop. (see *Plascon vs Evans Painting Ltd vs Van Riebeeck Painting (Pty) Ltd* 1984 (3) S.A. 623 (A) at 634 H – I and *Hudson vs The Master* 2002 (1) S.A. 862 (T) at 870 B – D).

For the above-mentioned reasons I would dismiss the application on this ground. I find it unnecessary in view of the conclusion I have reached immediately above to proceed with the determination of the other outstanding matters viz, whether Applicant has satisfied the requirements of an interim interdict.

As to the question of costs *Mr. Mabila* applied that I award costs at a punitive scale as Applicant ought to have known that disputes of fact would arise. The question of costs is always in the discretion of the court. In this instance I would not go so far as to grant costs at this scale but costs at the normal scale.

The court order

The application is dismissed with costs at the normal scale.


S.B. MAPHALALA
JUDGE