THE HIGH COURT OF SWAZILAND

Civil CaseNo.2137/04

In the matter between:

THE COURIER AND FREIGHT GROUP (PTY)	**Applicant**
LTD And	
PATRICK MAZIYA	**1st Respondent**
CONCILIATION MEDIATION	
AND ARBITRATION TRIBUNAL	**2nd Respondent**

CORAM : **MASUKUJ.**

For the Applicant	**: Mr R.S. Mhlanga**
For the 1st Respondent	**: Mr Muzi Simelane**
For the 2nd Respondent	**: No appearance**

JUDGEMENT
11th August, 2004

Serving before me is an application launched on an urgent basis and in which the above-named Applicant prays for *inter alia:* -

1. Dispensing with the Rules of the above Honourable Court and hearing this matter as one of urgency.

2. That a *rule nisi* do issue calling upon the Respondents on a date to be Fixed by the above Honourable Court to show cause why:

(a) The hearing scheduled for the 29th July, 2004 between the Applicant and 1st Respondent should not be stayed, pending the fmaiisation of these proceedings.

(b) The vehicles hereunder listed should not be returned to the Applicant;

lx Nissan CW 350 Horse Truck
lx Toyota 2.4 Bakkie

(c) The 1st Respondent should not be ordered to pay the storage costs for the above described vehicles.

(d) The 1st Respondent should not be ordered to pay the costs of this application.

(e) Further and/or alternative relief

3. That paragraph 2 (a) operate with immediate effect pending the fmaiisation of these proceedings.

On the date of hearing i.e. the 29th July, 2004, after listening to arguments raised on behalf of the litigants, I refused to grant prayer 1 above and ordered the Applicant to pay the costs, the scale of which I reserved for pronouncement in this judgement. I indicated to the parties that the reasons for the Orders I made on the 29th July, will follow in due course. They now follow: -

Background

This matter appears to have a convoluted history which has seen it serving before the Second Respondent, the Industrial Court and this Court. In this Court, the matter between the parties has served on no less than two occasions. I will deal briefly with the background relevant to the present application.

The background, giving rise to the present application can be conveniently summarised as follows: - The 1st Respondent was employed by the Applicant as Regional Operations

Manager. As a result of certain actions, which are immaterial to this matter, but which were vrewed as misconduct by the Applicant, the 1st Respondent, was, after a disciplinary enquiry dismissed. After goin g through the gauntlet set out in the Industrial Relations Act, 2000, the matter was placed before the 2nd Respondent, which found in the 1st Respondent's favour on reasons that are again immaterial to this matter. The 2nd Respondent awarded the 1st Respondent amount at E78,000.00 for unfair dismissal. This award was endorsed by the Industrial Court as an Orde r of Court on the 19th January, 2004.

In its Founding Affidavit, deposed to by one Walter Schroeder, the Applicant's Regional Operations Manager, the Applicant states that in February, 2004, it instituted contempt proceedings before this Court under case No. 129/04, resulting from the non observance of an Order of this Court date d 26th January, 2004. The said Order was granted by consent between the parties after the matter had served before the Acting Chief Justice, who endorsed the said Order.

It may be necessary to capture the salient portions of this Order. It was agreed that a sale in execution scheduled for the 30th January, 2004, be stayed; the Writ of Execution dated 9th January, 2004, be set aside , and that the above prayers operate with immediate effect. It was further agreed that the 1st Respondent would release a Nissan CW 350 Horse Truck together with a Toyota Bakkie to the Applicant and that on delivery of the above vehicles, the Applicant would hand over the blue books of the said vehicles to the 1st Respondent. The Applicant, in the same Order undertook not to dispose of the above vehicles pending the fmaiisation of the proceedings and further undertook to pay the 1st Respondent all the money due to him within a reasonable time after demand, if judgement were granted in his favour.

It would appear that the said vehicles were not delivered to the Applicant, culminating in the Applicant moving a civil application for contempt against the 1st Respondent. That Application, together with two other applications, one being for the review of the Order of the Industrial Court endorsing the award and a review of the Order of the 2nd Respondent in relation to the award. Th e Applications were argued before Nkambule J. who remitted the matter to the 2nd Respondent, in relation to the review. In connection with the civil contempt proceedings, Nkambule J. noted that the application was not opposed and he found the 1st Respondent "guilty as charged". He proceeded to "caution and discharge" him.

In view of the continued non-compliance with the consent Order for the release of the vehicles, which persists, the Applicant prayed for the Orders abdve and further sought the staying of the proceedings before the 2nd Respondent, which fell on the day of the hearing of the urgent application.

In response to this application, the 1st Respondent raised two points of law relating to the urgency of the matter and that the Applicant is not entitled to the relief sought by virtue of the provisions of Sections 11 (4) of the Industrial Relations Act *{supra).* I will deal first with the issue of urgency.

Urgency

Mr Simelane, in his spirited address, argued that the Applicant had failed to meet the mandatory of requirements of Rule 6 (25) and had therefor dismally failed to show that the matter was sufficiently urgent to warrant the jettisoning of the normal provisions of the Rules.

Mr Simelane argued that the Applicant had been aware that the matter would serve before the 2nd Respondent as far back as the 24th June, 2004 when the judgement was delivered by Nkambule J. and that it had abused the urgency procedures by setting the matter down on such short notice.

Rule 6 (25) which is operative in such matters reads as follows: -

(a) In urgent applications the Court or Judge may dispense with the forms and servic
e provided for in these rules and may dispose of such matter at such time and
place and
in such manner and in accordance with such procedure (which shall as far as practicable
be interms of these rules) as to the Court or Judge, as the case may be, seems fit.

(b) In every affidavit or petition in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers rende r the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course."

A compendium of the interpretation of the above sub-Rule is to be found in an array of judgements of this Court and from which I will mention but a few. In HUMPHREY H. HENWOOD VS MALOMA COLLIERY AND ANOTHER CASE NO.1623/93, (unreported) Dunn J. correctly held that the above provisions are peremptory. This view has been endorsed.

In MEGALITH HOLDINGS VS RMS TIBIYO (PTY) LTD & ANOTHER CASE NO.199/2000 (unreported) at page 5, I had occasion to deal with the above provisions and the duty placed on an applicant by the Sub-Rule. I stated the following: -

> *"The provisions of Rule 6 (25) (b) exact two obligations on any Applicant in an urgent matter. Firstly that the Applicant shall in the affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the 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 brought to the Court's attention from the bar in an embellishing address by the Applicant's counsel. "*

It now remains to be seen whether the Applicant *in casu* has complied with the above requirements, which I must add, are mandatory. In addressing the question of urgency, the Applicant states the following at paragraph 14 of the Founding Affidavit: -

> *"I submit that the matter is urgent for the following reasons:*
>
> *i) The Applicant needs the vehicles for carrying on its business as couriers.*
>
> *ii) The vehicles are deteriorating in value on a daily basis and are not bringing any income.*
>
> *iii) If the 2nd Respondent is allowed to go on with the hearing on the 29th July, 2004, this will amount to a condonation of the fact that the 1st Respondent is to date in contempt of the above Honourable Court's order.*

iv) Lastly, it would be unjust and unfair, if the Applicant is called upon to conciliation with the 1st Respondent as he has no regard for the rule of law and has no respect for court decisions or orders. "

Whilst the reasons for the urgency raised by the Applicant may be sweet-sounding and appear compelling to the unwary, they do not in any way seek to address the reasons why the Applicant claims it could not be afforded substantial redress at a hearing in due course as required by Rule 6 (25) (b) in particular. There was no attempt, even a feeble one at that, to address such an important and mandatory requirement. Mr Mhlanga readily and correctly conceded this without a fight.

I can in this wise do no better than to refer to the judgement of Sapire C.J. (as he than was) in the unreported judgement of H.P. ENTERPRISES (PTY) LTD VS NEDBANK (SWAZILAND) LTD CASE NO. 788/99, where the following incisive remarks appear: -

"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow. "

In this regard, the Applicant has dismally failed. As the provisions are peremptory, litigants, particularly the Applicants, must not merely pay lip service to the above requirements in their papers, resting on the forlorn hope that at the hearing, the Court will be moved by an emotional incisive and compelling address to overlook the mandatory requirements of the Rules and sympathise with the Applicants and thereby readily enrol the matter as one of urgency. This perception must be dispelled.

The Application also has to fail on urgency for other reasons as well. As correctly pointed out by Mr Simelane, the Applicant was aware as from the 24th June, 2004, that the matter had been remitted to the 2nd Respondent. The Conciliator, Mr Zwane, by letter dated 12th July, 2004 and transmitted by facsimile to the Applicant on even date, advised the parties that the

hearing would take plac e on the 29 July, 2004. This constituted sufficient notice to the Applicant to indicate an y difficulties it would have with the matter proceeding on that day. There are no reasons wh y the application was not brought earlier, or better still, why the letter of objection was not written to the 2nd Respondent and copied to the 1st Respondent and followed up with an ora l application for the deferment of the matter on the grounds now placed before this Court. This was a sensible and cost effective route.

In relation to the vehicles , it is clear that these have been kept by the 1st Respondent, in the face of the Consent order, which fact bodes ill for the 1st Respondent, I must say, since the end of January, 2004. The vehicles have not been released for the past six (6) months and there is no explanation, in the light of the Consent order and the judgement dated 24th June,
2004, why the matter ha s suddenly become urgent that the Respondents in this case had to be given only a few hour s notice to come to Court. This smacks highly of an abuse of the process of the Court, whic h must be discouraged.

The conduct on the par t of the Applicant forces the Court to lean heavily in favour of enforcing the Applicant' s rights and be seen, in the process, trampling on or not giving due weight to those of the Respondent's, in relation to the questions of notice, consultation and preparation for the hearing. I must perforce reiterate the illumating and timeless remarks of Flemming D.J.P. in GALLAGHE R VS NORMAN' S TRANSPOR T LINE S (PTY) LTD
1992 (2) SA 500 (W) at 502 E-F 503 A, where the following trenchant remarks of the Learned Deputy Judge President appear: -

> *"Rule 6 (5) (a) of the Uniform Rules of Court is peremptory. An application must be in accordance with Form 2 (a)...No Ride says that any of the said obligations do not apply to an urgent application. Such an application is an 'application' in terms of Rule 6 (5). The only qualification is that in an urgent matter, an applicant may 'amend the rules of the game' without asking the permission of the Court...But the intent of the Rules is that such amendment is permissible only in those respects and to that extent which is necessary in the particular circumstances ....The Court is enjoined by the Rule to dispose of an urgent matter by procedures which shall as far as practicable be in terms of these Rules; that obligation must of necessity be refected in the attitude of the Court about which deviations it will tolerate in a specific case. The mere existence of same urgency cannot therefore justify an*

applicant not using Form 2 (a) of the First Schedule to the Uniform Rules. The Rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned - and a rule nisi sought. The Applicant must, in all respects responsibly strike a balance between the duty to obey Rule 6 (5) and the entitlement to deviate, remembering that the entitlement is dependent upon and it thus limited according to the urgency which prevails. "

I am of the view that although the Rules referred to above may not be in *pari materia* in every respect with our Rules, that the principles enunciated therein are of equal application and relevance to this jurisdiction as well. Practitioners would be implored to consider the above principles before launching any matter they deem is urgent. It was for the above reasons that I refused to grant the relief sought in prayer 1 of the Notice of Motion.

In view of the aforegoing, I find it unnecessary to consider the other leg of Mr Simelane's argument and I proffer or venture no opinion thereon. This will lead me to the outstanding question of costs.

Costs

At the hearing, as indicated earlier, costs were awarded in the 1st Respondent's favour. I now have to determine the scale of such costs. Mr Simelane urged the Court to mulct the Applicant with punitive costs to mark its disapproval of the abuse of its processes by the Applicant.

Costs at the punitive scale are not lightly granted. There must be some conduct or action on the part of the losing party which is dishonourable, unworthy, vexatious or malicious. This list is not exhaustive. See IN RE : ALLUVIA L CREEK , 1929 CP D 532.

It is an indubitable fact that the Applicant in this case may correctly be regarded as having abused the process of the Court considering its tardiness and the inadequacy of the notice afforded to the Respondents in the circumstances. The notwithstanding, I do not perceive the attitude of malice or vexatiousness as motivating the Applicant in acting in the manner it did. To the contrary, this would appear to have resulted from a frustration caused by the 1st

Respondent's refusal to comply with an Order of Court, to which it consented. I therefor order costs to be on the ordinary party and party scale.

I have not heard full argument on the reasons advanced for the non-compliance but I am unable to agree with the little that Mr Simelane said i.e. that the blue books were not tendered by the Applicant. The delivery of the trucks is, from the Order, the *condictio sine qua non* for the delivery of the blue books and this is apparent from the Consent Order. There was no intention to render these *pari passu* or that the delivery of the blue books would precede the delivery of the trucks.

The refusal of prayer 1 must not be construed and regarded as a vindication by this Court of the stance adopted by the 1st Respondent of treating the Consent Order contumely. As evident above, the circumstances were such that I could not venture into the issues of contempt of Court.

T.S. MASUKU
JUDGE *J*